North Star Steel Company *and* International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 7-CA–43609(1)(2) and 7–CA–44077

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 11, 2002, Administrative Law Judge Paul Bogas issued the attached decision. The General Counsel and the Charging Party filed separate exceptions and supporting briefs, and the Respondent filed cross-exceptions and a supporting brief. The Respondent also filed a brief in opposition to the other parties' exceptions. The Charging Party filed an answering brief to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, except as modified below, and to adopt the recommended Order as modified and set forth in full below.[2]

The Respondent operates several steel mills throughout the United States, including a facility in Monroe, Michigan. In an election held on September 21, 2000,[3] the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO won a majority of the valid votes cast by the Respondent's Monroe plant employees. On September 29, the Union was certified as the exclusive representative of a production and maintenance employees unit at the Monroe facility.[4]

The judge found that the Respondent committed several unfair labor practices affecting the Monroe plant employees. He found violations based on several preelection statements by David Lewis in mid-September and the Respondent's failure to supply the Union with information about a transfer of unit work from the Monroe facility that took place in December. As more fully described below, we adopt these violations. The judge also found unlawful a transfer of 175 tons of steel production from the Monroe plant in December and the withholding of financial and competitor information that the Union first requested in late October. As indicated below, we reverse the judge, find no violations, and dismiss these complaint allegations.[5]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissals of the 8(a)(1) allegations involving employee Kathy Lafayette; the 8(a)(3) allegations relating to the elimination of the scrap-yard positions and the displacement of the three scrap-yard employees; the 8(a)(5) allegation pertaining to item 13 set forth in the Union's October 24, 2000 information request; and the 8(a)(5) allegation pertaining to the Union's information request regarding the use of outside contractors to stack squares. There is also no exception to the judge's rejection of the Respondent's 10(b) defense pertaining to the elimination of the scrap-yard positions.

[2] The judge found that the Respondent unlawfully failed to bargain over the decision to eliminate three scrap-yard operator positions and the displacement of three employees at the Monroe facility. As more fully discussed in the Amended Remedy section of this Decision, we shall modify the judge's recommended remedy, Order, and notice to employees for this violation to impose a limited backpay remedy consistent with the effects-bargaining remedy set forth in *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

Member Walsh does not agree with his colleagues about the nature of this violation and the appropriate remedy for it. He is separately dissenting on this issue.

[3] All dates are in 2000, unless otherwise indicated.

[4] The unit represented by the Union consists of:

All full-time and regular part-time production and maintenance employees, including stores employees, shipping and receiving employees, and quality assurance employees, employed by the Respondent at its Monroe, Michigan facility; but excluding all metalographers, department clerks/plant clerical employees, draftsmen, office clerical employees, electronics technicians, professional employees, supervisors and guards as defined in the Act.

[5] The judge also dismissed other complaint allegations relating to employee layoffs implemented in January 2001, and the lack of an annual wage increase at the Monroe facility in 2001. We affirm these dismissals for the reasons stated by the judge. Member Walsh is separately dissenting on the annual wage increase issue because he would find a violation of the Act.

Member Walsh takes the position that the Respondent violated the Act when it failed to bargain about its decision not to grant a wage increase in 2001. He asserts that "by the time the Union became the collective-bargaining representative, these annual wage increases for Monroe employees had become an established pattern and practice over many years and therefore constituted a condition of employment which the Respondent was not free to change unilaterally." We disagree.

The judge reasonably found that the granting of annual wage increases was not part of the status quo prior to the Union's certification and certainly not part of the status quo during periods when the Respondent's business at Monroe was poor. It is undisputed that the state of the Monroe facility's business was poor in 2000–2001. Mike Roper, who had worked at the Monroe facility since it began operating and became its works manager in 1999, testified without contradiction that the downturn in Monroe's business commencing in 2000 was the bleakest period in the 22-year history of the Monroe facility. In determining the status quo for the Monroe facility, the judge reviewed the Respondent's wage practice for the entire 22-year history of the Monroe facility. In most years, the Respondent gave annual wage increases to employees. However, when it experienced economic difficulty in the 1980s, the Respondent did not give wage increases to employees at the Monroe facility in 5 of those 10 years. Like the judge, we consider the Respondent's wage practices of the 1980s to be particularly relevant to the status quo question. To consider otherwise, as suggested by our colleague, would seem to unfairly skew the data and would result in an

I. DAVID LEWIS' PREELECTION STATEMENTS

David Lewis, acting as an agent for the Respondent, discussed the union campaign with Monroe plant employees at a series of a dozen or more mandatory meetings. These meetings took place over the course of several days, approximately 1 week before the election. The judge found that certain statements by Lewis at those meetings violated Section 8(a)(1) of the Act.

A. Statements Implying Futility of Union Representation

At the preelection employee meetings, Lewis identified himself as the Respondent's lead contract negotiator if the Monroe facility became unionized. The credited evidence reveals that Lewis told the employees that he would not allow the Union to "succeed" and that if employees "were to get the Union in and get a contract, if you have what you have right now, we would consider that . . . succeeding and we do not want that to happen because we're afraid of the domino effect [on] other nonunion plants." The judge found that Lewis had implied to employees that collective bargaining would be futile because such bargaining would not result in the employees obtaining benefits other than what the Respondent chose to give them and that unionization would necessarily lead the Respondent to choose to give fewer benefits to employees. The judge concluded that Lewis' statement violated Section 8(a)(1) because employees could reasonably infer futility of union representation. We adopt these findings and conclusion.[6]

B. Statements About Reduced Hours and Layoff

Lewis also told the assembled employees that he was proud that there had been no layoffs at the Monroe facility in the past. According to the credited evidence, he explained that the Respondent had been able to avoid layoffs at its union-free facilities, but it had been forced to lay off employees at its unionized facilities, because the union-free arrangements allowed the Respondent the flexibility necessary to keep employees busy during economic downturns. Lewis asked employees: "Who here would like to work 32 hours or get laid off? How do you like 32 hours? We can do that."

The judge found that Lewis' assertion about no layoffs at the Monroe facility was incorrect. The judge specifically determined that the Respondent had at least two layoffs before the Union's campaign in 2000.[7] Thus, the judge concluded that Lewis did not have a basis in objective fact to tell employees that the Monroe facility had never had a layoff in the past and that the reason for no layoffs was the union-free arrangement that existed at the Monroe facility. The judge concluded that Lewis' statements about reduced hours and layoffs, described above, constituted an unlawful threat in violation of Section 8(a)(1) of the Act. We agree that the Respondent unlawfully threatened employees, as explained below.[8]

To clarify, the evidence establishes that the Respondent did not actually threaten to reduce hours if the Union got in, but threatened that it would *not have the flexibility to reduce hours* during economic downtimes if the Union got in, and that it would be forced instead to lay off some employees under such circumstances. The underlying premise for Lewis' comments is a prediction that the Respondent would not be able to have flexibility to implement reduced work hours in place of economic layoffs for its employees if the Monroe facility became unionized. However, Lewis failed to support this prediction with concrete examples and information, as the credited testimony of employees Mike Carmody and Willie R. Hall revealed. By crediting their testimony, the judge rejected the testimony of the Respondent's witness, James Jonasen, about Lewis' statements.

Lewis did not testify at the hearing, and the Respondent's witnesses did not indicate that Lewis based his comments on "the strictures of Union contracts," as suggested by our dissenting colleague. In *Tri-Cast, Inc.*, 274 NLRB 377, 378 (1985), cited by our dissenting colleague, the employer indicated to employees that it could lose its ability to successfully conduct its operations because of "union restrictions." But, in the instant case, there is no credited evidence that Lewis ever referred to any "union restrictions" in support of statements during his meetings with the employees. Specifically, Carmody credibly testified:

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elimination of the period of most compatibility to Monroe's declining business situation that existed in January 2001.

[6] We therefore find it unnecessary to pass on the judge's findings relating to other comments made by Lewis that are identified in sec. III,A,1, last par., of the judge's decision because a finding of any additional futility violation is cumulative and does not affect the remedy and the Order. Member Walsh would affirm all of the judge's findings of fact and conclusions of law on this issue.

[7] There are no exceptions to the judge's findings about the existence of layoffs at the Monroe facility. The Respondent also does not dispute that during one of the preelection meetings held by Lewis, an employee corrected Lewis' misstatements.

[8] In addition to the cases cited by the judge, including *Hertz Corp.*, 316 NLRB 672, 686 (1995) ("In effect the [company] implied to its employees that the selection of a union to represent them could result in layoffs which the Union could do nothing about."), we also rely on *Times-Herald Record*, 334 NLRB 350 (2001) (publisher's prediction—that the newspaper would not continue its practice of stretching part-time jobs into 8-hour jobs in order to keep the drivers employed full time—was a threat and not a permissible statement of economic reality).

> Lewis started off the meeting with a little history of North Star and what had happened during the tough times in the past and he had some index cards so he, you know, he read his cues from that and he said that in the past when times were tough at the Monroe division that they had not laid anybody off because the management team at the Monroe division would go to corporate and say hey, we can keep our people busy, we don't need to lay 'em off, and he said that the reason that we were able to do that is we were non-union and the union plants didn't have to do that they had to go to their layoff policy, that's how they dealt with it.

During the preelection meetings, Lewis related no specific incidents where the Respondent, in trying to cope in depressed economic times, had less flexibility at its unionized facilities. Instead, Lewis misstated the past history at the Monroe plant before the Union came on the scene.[9] The Respondent furnished no objective basis for claiming that unionization would adversely affect its ability to be flexible during economic downtimes. Furthermore, Lewis' remarks about reduced hours and layoffs were made in the course of the same speech in which Lewis unlawfully threatened futility of union representation and unlawfully compared the selection of union representation to a "bad divorce."

Given all these circumstances, the Respondent failed to satisfy its burden to justify Lewis' statement equating inflexibility with unionization.[10] Thus, we find a violation of Section 8(a)(1).

[9] Interestingly, Lewis' prediction turned out to be wrong. The judge found that after the Monroe facility became unionized, the Respondent bargained with the Union and lawfully implemented a 32-hour reduced schedule to curtail production at the Monroe facility in late November. No exceptions were filed to this finding.

[10] For the reasons set forth in his separate dissent, Chairman Battista would find no violation and would dismiss this complaint allegation.

In his separate dissent, Chairman Battista argues that it was not threatening for the Respondent to tell employees about the possibility of layoffs in economic downtimes. We think that our dissenting colleague's argument misses the mark. First, Lewis bragged (albeit incorrectly) that there had been no layoffs at the Monroe facility. Then, he stated that the Respondent had been forced to lay off employees at unionized facilities. In this context, Lewis asked the rhetorical question, "Who here would like to work 32 hours or get laid off?" Thus, Lewis' statements suggest, without any foundation, that if the Monroe facility became unionized the Respondent's options would be limited and the Respondent would no longer be able to choose to reduce work hours in lieu of implementing layoffs during depressed economic times. In our view, Lewis' statement would reasonably be interpreted by employees as a threat of inflexibility with the onset of union representation, indicating that employees will suffer financially in a unionized setting. Thus, unlike our colleague, we think that employees would reasonably understand from Lewis' remarks that a reduced work schedule for them would not be available if the Union was selected as their representative.

C. "Bad Divorce" Threat

At these same preelection meetings, Lewis also commented on the employer-employee relationship that existed at the Monroe facility. The credited evidence shows that Lewis said that there was a 22-year relationship between management and hourly workers at the Monroe facility and that a third party was now trying to interfere with that relationship. He compared the relationship to a "marriage," and said that if the employees selected the Union to represent them, it would be a "bad divorce." The judge found that Lewis' remark constituted an unprotected threat of different, unfavorable treatment if the employees select the Union as their representative. For the reasons stated by the judge and as explained further below, we find that Lewis' "bad divorce" statement violated Section 8(a)(1).[11]

In determining whether a statement by an employer violates Section 8(a)(1), or is protected by Section 8(c), the Board considers the totality of the relevant circumstances.[12] Applying that standard, we observe that Lewis gave his "bad divorce" statement in the same preelection meetings where he made the unlawful threat of futility of union representation and the unlawful threat about reduced hours and layoff. These threats would reasonably inform an employee's interpretation of Lewis' "bad divorce" comment. Heard in the context of these other

[11] For the reasons set forth in his separate dissent, Chairman Battista would find no violation and would dismiss this complaint allegation.

We find distinguishable the cases relied on by our dissenting colleague. In *John W. Hancock Jr., Inc.*, 337 NLRB 1223, 1224 fn. 7 (2002), the employer at a plantwide meeting referred to employee card solicitors as the "enemy within," while the employer in *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 708 (1992), enfd. 991 F.2d 786 (1st Cir. 1993), distributed a letter to employees assertedly associating the union with strikes and violence. The Board examined the "context" of the particular statement at issue in each case and determined that neither comment lost the protection of Sec. 8(c) of the Act. The Board majority in *Hancock* emphasized that the "enemy within" statement was unaccompanied by any other threats or unlawful statements. In *Optica Lee Borinquen*, the Board adopted the judge's finding that the letter's disparagement of the union was unaccompanied by any intimation that strikes and violence were inevitable consequences of unionization. Thus, the context of the employer's statements weighed strongly in favor of finding no unlawful threats in both cases. Yet, in the instant case, the Chairman ignores the "context" of the "bad divorce" statement and instead considers Lewis' words in isolation to find that the "bad divorce" statement is protected speech under Sec. 8(c) of the Act.

Member Walsh did not participate in either *John W. Hancock Jr., Inc*., or *Optica Lee Borinquen.* He agrees, however, with Member Liebman's dissenting position in *John W. Hancock Jr., Inc*., he expresses no view here as to whether the issue in question in *Optica Lee Borinquen* was correctly decided. But in any event, he agrees with Member Schaumber that those cases are distinguishable from the instant case.

[12] See, e.g., *Center Service System Division*, 345 NLRB 729, 731 (2005); *Contempora Fabrics*, 344 NLRB 851 (2005); *Saginaw Control & Engineering*, 339 NLRB 541, 541 (2003).

threats, Lewis' "bad divorce" statement would reasonably suggest a similar negative, retaliatory message to employees. An employee would reasonably understand that Lewis was intimating that not only would there be changes in the Respondent's relationship with them (as in a divorce) if they selected the Union as their bargaining representative but also they could anticipate repercussion and difficulties (because the situation would be "bad") if the Union was their representative. To that extent, the "bad divorce" statement goes beyond a permissible negative view of union intervention.[13] In our view, employees could reasonably equate Lewis' "bad divorce" comparison with an implicit threat of reprisal if employees supported the union.[14] Thus, considering the totality of the circumstances, we find that Lewis' "bad divorce" statement reasonably had the tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

II. TRANSFER OF 175 TONS OF STEEL PRODUCTION

A. Refusal to Bargain

On one occasion in December, the Respondent transferred the production of 175 tons of steel from its Monroe facility to its St. Paul facility. As the judge recognized, the December transfer constituted less than 1 percent of a single month's production for the Respondent. More precisely, it represented 0.006 percent of the December's production. The Respondent never notified the Union or gave it an opportunity to bargain about this transfer.[15] Acknowledging that this work transferred in December constituted a small fraction of the Monroe facility's overall production, the judge concluded, nonetheless, that the Respondent violated Section 8(a)(5) and (1) by failing to bargain over its decision to transfer the processing of the 175 tons of steel. The Respondent argues that it had no bargaining obligation because the transfer was an isolated incident that caused a minimal loss of work. We reverse the judge. We find, for the reasons stated below, that the Respondent had no duty to bargain with the Union about this transfer of work.

Generally, an employer has a duty to bargain with the exclusive representative of a unit of its employees before making a change in wages, hours, or other working conditions, but that duty arises only if the change is a "'material, substantial, and a significant' one affecting the terms and conditions of employment of bargaining unit employees."[16] The General Counsel bears the burden of establishing that the change was material, substantial, and significant. We conclude that the General Counsel has not carried this burden of proof here.

The General Counsel offered no evidence that the December transfer of 175 tons of steel production adversely affected any employee. The judge noted that the timing "coincided" with reduction in employee hours and contemplated layoffs due to business downturn affecting the steel industry. There is no dispute that the steel industry was suffering depressed business conditions that affected the Respondent.[17] But, there is no evidence in the record that demonstrated a causal connection between this minimal transfer of unit work in December and the reduction in the employee hours in November and the layoffs in January 2001. In fact, the General Counsel offered no evidence concerning the number of employees or the number of work hours involved in processing the 175 tons at either the Monroe or St. Paul facilities.[18]

In order to transform the 175 tons transfer into a "material, substantial, and significant" change, the judge coupled the transfer with a separate incident of increased contracting out of the "stacking of squares" and found that the two incidents together "dealt an appreciable blow to the jobs and hours."[19] We find that there is no reasoned basis for lumping these two incidents together because the two incidents were not shown to be sufficiently related or similar to justify treating them, in effect, as one event. The transfer of this one hot metal production order for 175 tons in December from one facility's melt shop to another facility's melt shop was done by the Re-

[13] While we agree with the general view expressed in *Optica Lee Borinquen,* supra, that Sec. 8(c) "does not require fairness or accuracy, and does not seek to censor nastiness," we find that Lewis' remarks, given their context, exceeded the protection of Sec. 8(c) on grounds other than fairness, accuracy, or nastiness.

Again, Member Walsh did not participate in *Optica Lee Borinquen* and expresses no view here as to whether the issue in question was correctly decided there.

[14] See, e.g., *Chemical Solvents, Inc*., 331 NLRB 706 fn. 3, 718–719 (2000) (supervisor's statement—that if the union went through, he could make employees' lives a "living hell"—was an unlawful threat of unspecified reprisals).

[15] The Union learned about the transfer of unit work after it had been accomplished.

[16] *Central Telephone Co. of Texas*, 343 NLRB 987, 1000 (2004); *Ironton Publications, Inc.*, 321 NLRB 1048 fn. 2 (1996) (unilateral removal of certain work historically performed by employees did not significantly impact bargaining unit).

[17] The record shows that, because of depressed business conditions, the number of heats produced had decreased since January 2000 when the Monroe facility produced about 420 heats (51,647 tons). In December 2000, hot metal production was about 220 heats (27,053 tons), but increased in January 2001 to 265 heats (32,587 tons), when the Respondent laid off employees after bargaining with the Union.

[18] In its answering brief, the Union correctly observes that the Respondent provided no factual basis for its contention that the December transfer of 175 tons of steel production amounted to no more than 3 hours of work.

[19] The "stacking of squares" involves opening bundles of steel bars as they are normally configured as part of the production process and reconfiguring those bars into new bundles to meet a particular client's specifications.

spondent's sales department located in Edina, Minnesota. On the other hand, the increased contracting out of the "stacking of squares" for a completed order rolled in November was done by the Monroe facility management. It is undisputed that the Respondent had previously contracted out, up to 40 percent, of the stacking work for a rolling. The Respondent conceded, however, that it wrongly contracted out more stacking for the November rolling than had been contracted out in the past. The December transfer of 175 tons and the November stacking of squares project are factually dissimilar, involving different management, different operations, different unit employees, and with no evidence connecting them. Adding these two incidents together is, thus, not justified.

Furthermore, the judge found that the stacking of squares itself constituted a significant portion of the shipping department inspectors' work, representing about 25 percent of their work. The increased amount of stacking work contracted out in November was, therefore, itself significant. Lumping the small December transfer with this independently significant change to the stacking work in November to find the December transfer was a "material, substantial, and a significant" change is untenable in our view.

We find that the Respondent had no duty to bargain about this insubstantial amount of steel production transferred in December. Accordingly, we shall dismiss the 8(a)(5) and (1) allegations pertaining to the Respondent's failure to notify the Union or bargain with it over the December transfer of 175 tons of steel production.

B. Information Request

At a meeting held on February 13, 2001, the Union asked the Respondent's works manager, Mike Roper, why some Monroe unit work was being sent to the Respondent's St. Paul facility. The judge found that Roper was aware of the December transfer of 175 tons of steel production from the Monroe facility to the St. Paul facility at the time of the February 13 meeting. However, Roper never told the Union about the December transfer of the processing of the 175 tons of steel production from the Monroe facility to the St. Paul facility. In March 2001, the Union again requested, first verbally and then in writing "any and all information regarding work and orders being sent, transferred to, or reassigned from the Monroe facility to the St. Paul facility." In a memorandum dated July 5, 2001, the Respondent responded to the Union's requests and refused to provide the requested information about the transfer of unit work. The judge concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with information regarding steel production that was being transferred or reassigned from the Monroe facility to the St. Paul facility. We adopt the judge's conclusion for the reasons set forth below.

It is well settled that an employer, on request, must provide a union with information that is relevant to its carrying out its statutory duties and responsibilities in representing employees. Information relating to wages, hours, and working conditions of employees in the bargaining unit is presumptively relevant. The Board uses a broad, discovery-type standard in determining relevance. The standard for determining relevance of the requested information is a liberal one, and it is necessary only to establish the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.[20]

We find that the Respondent refused to provide such relevant information when it refused to provide the requested information regarding the transfer of unit steel production work from the Monroe facility. We find that the Respondent had an obligation to furnish this information even though it had no obligation to bargain in particular about the December transfer of 175 tons of steel production (which, as found above, did not involve a material, substantial, and significant change). As the record shows and the judge found, the Union requested in March 2001 "any and all information" about *any* unit production work that the Respondent was transferring from Monroe to St. Paul.

The transfer of unit work is a mandatory subject of bargaining,[21] and contrary to our dissenting colleague, an employer's obligation to provide a union with requested information about it does not depend on whether the employer is also found to have had an obligation to bargain about the transfer of particular unit work.[22] Thus, we

[20] See *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–437 fn. 6 (1967).

[21] E.g., *Dallas & Mavis Specialized Carrier Co*., 346 NLRB No. 27, slip op. at 6 (2006) and cases cited therein; *Geiger Ready-Mix of Kansas City*, 315 NLRB 1021 (1994), enfd. in relevant part 87 F.3d 1363 (D.C. Cir. 1996); see also *St. George Warehouse, Inc.*, 341 NLRB 904 (2004) (Member Walsh dissenting on other grounds).

[22] E.g., *Certco Food Distribution Centers*, 346 NLRB No. 102, slip op. at 1–2; JD slip op. at 13 (2006); see *Clear Channel Outdoor, Inc*., 347 NLRB No. 47 (2006); see also *Somerville Mills*, 308 NLRB 425, 441–442 (1992). In *Somerville*, the Board found that the employer violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to supply the union with information that the union had requested regarding the employer's transfer of work, where employees had reported that unit employees were being sent home early and being laid off for lack of work while at the same time work was being shipped out of the plant. In that case, the Board found that the General Counsel sustained his burden of showing the requested information was relevant to the subject matter of complained-of layoffs, notwithstanding that the employer had told the union that there was no shortage of work due to the transfer, since the union was not required to accept the employer's assurances.

agree with the judge and adopt his ultimate finding of the violation.

III. FINANCIAL AND COMPETITOR INFORMATION REQUEST

Before the Union's certification as bargaining representative in late September, the Respondent began to see a drop in its business at its Monroe facility. The Respondent experienced a decline in the selling price for its product, a decrease in sales and backlog of outstanding orders, an increase in the cost of raw materials, and an increase in its inventory of finished product.

The Respondent tried to address this problem in several ways. For example, the Respondent curtailed production at the Monroe facility and sought concessions from the Union to reduce employee work schedules and to implement layoffs at the plant. In a letter dated October 24, the Union requested financial and competitor information from the Respondent to "help the UAW formulate contract proposals" and "enable the union to pursue productive negotiations" concerning the concessions sought by the Respondent.[23] The Respondent furnished some information, but it did not completely comply with the Union's request.

During bargaining sessions held on November 1, December 6, and January 4, 2001, the Respondent gave a considerable amount of financial information to the Union.[24] At the first session, the Respondent made a presentation about the poor market conditions troubling the Monroe facility at that time. The Respondent distributed documents indicating that the "extremely low" future orders were "a cause of great concern"; explaining that "prices [we]re falling as our competitors struggle for volume"; and describing new orders as "looking bleak." The Respondent told the Union that several competitors were "effectively bankrupt" and trying to sell off product to raise cash, while other facilities operated by the Respondent might face reductions due to the downturn in the steel industry. At the second of these bargaining sessions, the Respondent told the Union that Monroe's business had further deteriorated, adding that it might be in the "red" in December. The Respondent also stated that "business was really going south in a hurry." At the subsequent January bargaining session, the Respondent told the Union that business continued to be bleak.

The judge correctly found that the Union's request for financial and competitor information from the Respondent was not presumptively relevant to the Union's bargaining representative duties.[25] The requested information did not concern terms or conditions of employment for bargaining unit employees. The judge also properly found that the Respondent had no obligation to furnish the financial and competitor information to the Union unless the relevancy of such information to the Union's bargaining representative duties could be demonstrated. To resolve this question of relevancy, the judge focused on the November 1, December 6, and January 4 statements made by the Respondent, which are described above, to determine if the Respondent had claimed an inability to pay during negotiations with the Union. In the judge's view, the Respondent's statements "were not merely descriptions of 'market conditions,' but rather conveyed that the Respondent itself was financially in critical condition." Based on this interpretation, the judge found that the Respondent's statements constituted "a claim that actions such as the reduced work schedule and layoff were necessary because of the Respondent's financial inability to pay." For the reasons that follow, we reverse the judge.[26] We reject the judge's flawed interpretation of the Respondent's statements and his erroneous finding of an inability-to-pay claim that is premised on it.

When an employer bases its bargaining position on an asserted inability to pay, the union is entitled to request and review the employer's financial records to assess the

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Our colleague argues that *Certco* and *Clear Channel* are inapposite here because the information about the transfer of unit work that was unlawfully withheld in those cases, unlike here, was requested by the unions in the course of processing grievances that alleged that the transfers violated collective-bargaining agreements. But the findings of unlawful refusals to provide information about the transfers of unit work in those cases, even in the absence of corresponding findings of an obligation to bargain about such transfers, did not depend on the fact that the unions had filed contractual grievances over the transfer of unit work. In both cases, the Board expressly applied the broad, discovery-type standard discussed above in determining that the requested information was relevant, with a showing of possible or potential relevance being sufficient to establish the employers' duty to provide the information.

[23] The Union's letter requested 13 numbered categories of information from the Respondent. The Union claims that the Respondent did not adequately respond to items 4 through 7 of the letter. These four items identify the Respondent's income statements for the past 3 full years; the Respondent's general and administrative expenses, including details on management salaries and benefits; the Respondent's operating plans, budgets, forecasts, or other documents dealing with projected costs and operating results; and a list of all the Respondent's competitors including company name, address, whether they are unionized, and any wage and benefit information.

[24] As found by the judge, the Union notified employees that the Respondent had provided "comprehensive data surrounding the current business conditions which included shipments, net income, projected cycle forecasts, current and projected production schedules, booking reports, inventory and order backlogs, and general business conditions."

[25] See *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), affd. sub nom. *Graphic Communications Union Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992).

[26] Member Walsh is separately dissenting on this information request issue because he would adopt the violation found by the judge.

employer's representations about its dire financial condition.[27] But, if an employer claims concessions from the union are necessary for the employer simply to avoid competitive disadvantage in the marketplace, the employer has no obligation to open its books and provide financial and competitor information that may be requested by the union.[28] As the Board has pointed out, the distinction between "inability to pay" and "competitive disadvantage" is the difference between claims of "can not" and "will not."[29] In applying this distinction in *AMF Trucking & Warehousing*, 342 NLRB 1125, 1126 (2004), the Board stated:

> [T]he phrase "inability to pay" means, by definition, that the employer is incapable of meeting the union's demands. That is, the phrase means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. "Inability to pay" means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to nonsurvival in business.

Further, a claim based on the employer's projections of future inability to compete, whether or not linked to job loss, "is not synonymous with an assertion that the [employer] currently has, or will have, insufficient assets to pay." Id. Therefore, a mere unwillingness to pay does not trigger an employer's obligation to provide financial and competitor information to the union.[30]

Our review of the bargaining sessions held on November 1, December 6, and January 4 reveals that the Respondent identified two contributing factors for the decline in its business—diminishing future orders and declining prices—and traced the cause of these factors to the poor state of the steel industry at that time. The Respondent also linked its anticipated low December profit figures and depressed business to bad market conditions. Interestingly, the Respondent seemed to downplay the extent of its own financial predicament when it carefully drew a distinction between itself and some competitors who were in worse financial shape. In emphasizing that those competitors had serious cash flow problems and were "effectively bankrupt," the Respondent clarified that it had the advantage over its competitors and it still could pay employees.

The substance of these bargaining statements shows that the Respondent stayed completely clear of the subject of company assets and its ability to pay employees. The Respondent never stated, explicitly or implicitly, that it did not have sufficient assets on hand to operate the Monroe facility. The Respondent never suggested that it was financially incapable of operating the Monroe facility without implementing reduced work schedules and layoffs or that its business would not survive without agreement on the concessions for the Monroe facility.[31] We find that the Respondent relayed the message that it was losing money and would not pay, as opposed to could not pay, in order to stay competitive.

In the absence of evidence of a present "inability to pay" claim, we find that the requested financial and competitor information is not relevant to the Union's bargaining representative duties. We, therefore, find that the Respondent had no duty to furnish the requested information. Thus, we reverse the judge and find that the Respondent's failure to furnish the requested information to the Union did not violate Section 8(a)(5) and (1) of the Act. Accordingly, we shall dismiss the complaint allegations pertaining to items 4 through 7 of the Union's October 24 letter.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 6 and 7.

"6. The Respondent violated Section 8(a)(1) and (5) of the Act by failing to give the Union a reasonable opportunity to bargain before taking the following actions: eliminating three yard operator positions and displacing Cheryl Hoffman, Troy Daniels, and Scott Lambrix; and significantly increasing the percentage of squares it used outside contractors to stack.

7. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to supply information requested by the Union on March 6 and 16, 2001, regarding steel production being transferred or reassigned from the Monroe, Michigan facility to the St. Paul, Minnesota facility."

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[27] See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

[28] See *NLRB v. Truitt Mfg. Co.*, supra; *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 960–961 (D.C. Cir. 2003), denying enf. 335 NLRB 322 (2001).

[29] *Nielsen Lithographing Co.*, supra at 700.

[30] See *Nielsen Lithographing Co.*, id.; *Richmond Times-Dispatch*, 345 NLRB 195 (2005).

[31] In the instant case, the Respondent never suggested that the Company's survival was at stake. To this extent, *Shell Co.*, 313 NLRB 133 (1993), cited by our dissenting colleague, is clearly distinguishable. In that case, the employer informed the union that "economic conditions had affected them 'very badly, very seriously,' that present circumstances . . . were 'bad' and a matter of 'survival,' and that it needed the union's help because of its condition." Id. at 133. The Board found the employer claimed a present inability to pay because the employer's posture was grounded in assertions that it could not survive if it continued meeting its obligations under its most recent collective-bargaining agreement with the union. Id. at 133–134.

AMENDED REMEDY

Before the election that resulted in the Union's certification as the employees' bargaining representative, the Respondent decided, in February, to implement a new scrap-handling system using front-end loaders at its Monroe facility. As a consequence of this decision, the Respondent decided, in October, to eliminate three scrap-yard operator positions and displace three scrap-yard operators at the Monroe facility. The judge found that the Respondent unlawfully failed to bargain over the decision to eliminate three scrap-yard operator positions and the displacement of three employees at the Monroe facility. To remedy this violation, the judge recommended that the Respondent not only be required to bargain but also that the status quo ante be restored and that the employees be made whole for any lost pay or benefits.

We agree with the judge that the Respondent had a bargaining obligation and that it violated Section 8(a)(5) and (1) of the Act. However, the obligation was an effects bargaining obligation because the decision to eliminate three scrap-yard operator positions and displace three scrap-yard operators flowed from the earlier decision to implement a new scrap-handling system using front-end loaders. See *Fast Food Merchandisers, Inc*., 291 NLRB 897, 899–902 (1988) (make-whole relief inappropriate to remedy a bargaining violation where the layoff decision is an effect of an earlier management decision that is not a mandatory subject of bargaining). See also *Litton Business Systems*, 286 NLRB 817, 821–822 (1987), enfd. in relevant part 893 F.2d 1128 (9th Cir. 1990) (a restoration order was not appropriate to remedy an effects bargaining violation involving layoffs flowing from an earlier decision to convert the plant's machinery). Thus, the judge erred in recommending a "make-whole" remedy and restoration remedy for this violation.

The record shows that the Respondent's scrap-handling system in existence prior to 2000 required three employees per shift to operate two yard cranes and a locomotive that pulled freight cars along tracks. When it first informed employees in 1999 that it was examining new systems for its scrap-yard operation, the Respondent explained its objective as wanting to eliminate the high-maintenance scrap crane and reduce manpower by four persons (i.e., one employee per shift). The following year, when the Respondent decided to make a substantial change, it replaced the old yard crane/locomotive system with two front-end loaders. This new system allowed the Respondent the ability to reduce its overall manpower needs per shift. By design, each loader required only one person to operate it. Less equipment obviated the need for a third employee on the shift.[32] The fact that the Respondent retained the third employee on some of the shifts for a short while during the period of transition from the old system to the new system does not negate the fact that the decision to implement the new system with equipment for only two operators per shift produced the unlawful decision to select the three displaced employees by seniority, without bargaining with the Union. Thus, unlike Member Walsh, we find that the October selection process for displacement was but a "direct effect" of the earlier decision to utilize a scrap-handling system of two loaders manned by two operators.

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over the effects of its decision to change scrap-yard equipment at its Monroe, Michigan facility in August 2000, we shall order the Respondent, on request, to bargain with the Union concerning the effects of its decision. As a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision, three employees, Cheryl Hoffman, Troy Daniels, and Scott Lambrix, were displaced from yard-operator positions in the yard and the affected employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects of changing scrap-yard equipment in August 2000 on the affected employees, and shall accompany our Order with a limited backpay requirement designed both to make whole the displaced employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the displaced employees in a manner similar to that required in *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

Thus, the Respondent shall pay the three displaced employees backpay at the rate of their normal wages when last working in their yard-operator positions from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the

[32] The only other equipment operated during the shift—a small mobile crane used to pick up scrap—involved work that took only 15–30 minutes per shift, clearly not enough to justify having a third employee on the shift under the new scrap-handling system.

date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the decision to change scrap-yard equipment on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; and (4) the Union's subsequent failure to bargain in good faith, but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which they were displaced from the Yard Operator position to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last employed as yard operators on or about October 18, 2000. Backpay shall be based on earnings which the displaced employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, North Star Steel Company, Monroe, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with different or unfavorable treatment, if they engage in union or protected concerted activity.

(b) Threatening employees that it would not have flexibility to choose between reduced hours and layoffs in economic downtimes if the employees at its Monroe facility became unionized.

(c) Making statements to employees implying that collective bargaining with the Union will be futile.

(d) Refusing to bargain with the Union, as its employees' exclusive bargaining representative, with respect to the effects of the decision to change scrap-yard equipment at the Respondent's Monroe, Michigan facility in August 2000 on the following unit of employees:

> All full-time and regular part-time production and maintenance employees, including stores employees, shipping and receiving employees, and quality assurance employees, employed by the Respondent at its Monroe, Michigan facility; but excluding all metalographers, department clerks/plant clerical employees, draftsmen, office clerical employees, electronics technicians, professional employees, supervisors and guards as defined in the Act.

(e) Significantly increasing from preelection levels the proportion of square stacking work performed using outside contractors rather than bargaining unit employees, without the Respondent first giving the Union notice and a reasonable opportunity to bargain.

(f) Failing to provide the Union, in a timely fashion, with information regarding steel production that was transferred or reassigned from the Monroe, Michigan facility to the St. Paul, Minnesota facility.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union with respect to the effects of the decision to change scrap-yard equipment at the Respondent's Monroe, Michigan facility in August 2000 on unit employees, and reduce to writing and execute any agreement reached as a result of such bargaining.

(b) On request, bargain collectively and in good faith with the Union regarding the change described in paragraph 1(e) of this Order.

(c) On request, rescind the change described in paragraph 1(e) of this Order; restore the status quo ante, and make whole any unit employees who have suffered losses as a result of the change, with interest, as set forth in the amended remedy section of this Decision.

(d) Pay Cheryl Hoffman, Troy Daniels, and Scott Lambrix, who were displaced from their yard-operator positions, backpay at the rate of their normal wages when last working in their yard-operator positions from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the decision to change scrap-yard equipment on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; and (4) the Union's subsequent failure to bargain in good faith, but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which they were displaced from the yard-

operator position to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last employed as yard operators on or about October 18, 2000, with interest, as set forth in the amended remedy section of this Decision.

(e) On request, furnish the Union, in a timely fashion, with information regarding steel production that was transferred or reassigned from the Monroe, Michigan facility to the St. Paul, Minnesota facility.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Monroe, Michigan facility copies of the attached notice.[33] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2000.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues and the judge, I do not find that the Respondent violated Section 8(a)(1) of the Act by threatening employees with different, unfavorable, treatment or by threatening them with reduced hours and layoffs. I also do not find that the Respondent violated Section 8(a)(5) because it did not provide information to the Union about the transfer of an order for 175 tons of steel production in December 2000 from its Monroe, Michigan facility to its St. Paul, Minnesota facility.

David Lewis' Statements at Employee Meetings

The judge concluded that, in meetings during the organizing campaign, vice president of human resources, David Lewis threatened employees with different and unfavorable, treatment when he compared the 22-year relationship between management and hourly employees to a "marriage" and said that it would be a "bad divorce" if employees allowed a "third party" to come between them. The judge separately concluded that Lewis unlawfully threatened employees with reduced hours and layoffs. Lewis stated that there never had been layoffs at the Monroe facility. He asked employees "who here would like to work 32 hours or get laid off?" "[H]ow do you like 32 hours? We can do that."

Section 8(c) of the Act provides that the expression of opinion, unaccompanied by threats or promises, does not violate the Act. Lewis' statements here amount to the mere expression of his opinion protected by Section 8(c) of the Act and could not reasonably be understood as threatening reprisal.

The judge found that Lewis' "bad divorce" analogy was a threat because it suggested that the Respondent would develop a hostile posture toward employees. The statement does not imply retaliation against the employees. The "bad divorce" analogy was merely an emphatic way of expressing his view that after a 22-year "marriage" between management and employees, the presence of a Union would come between them, to the detriment of the marriage. Emphatically expressing one's negative view of union intervention does not convert that view into a threat.[1] The fundamental purpose of Section 8(c) is to protect employers' right to do precisely what Lewis did: oppose a union organizational campaign vigorously and strenuously. See *John W. Hancock Jr., Inc.*, 337 NLRB 1223, 1224 fn. 7 (2002) (referring to employees who solicit union cards as the "enemy within" entirely consistent with the proposition that employers are entitled to oppose, vigorously and strenuously, union

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *Chemical Solvents, Inc*., 331 NLRB 706 fn. 3, 718–719 (2000), cited by my colleagues, is distinguishable. There the supervisor made an explicit threat of retaliation to employees by telling them that if the union came in he could make employees' lives a "living hell." Lewis' analogy contained no threat.

organizational campaigns and not an implicit threat of reprisals.) *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 708 (1992), enfd. 991 F.2d 786 (1st Cir. 1993) ("Section 8(c) does not require fairness or accuracy, and does not seek to censor nastiness.").

Similarly, Lewis' remarks about layoffs and working "32 hours" are not reasonably construed as a threat of retaliation for selecting the Union. As to the layoffs, Lewis told employees that, during past economic downturns, its union facilities experienced layoffs under the provisions of the collective-bargaining agreements, but that the Respondent had been able to avoid layoffs at its nonunion facilities. But there had been prior layoffs at the Monroe facility. Indeed, the employees themselves pointed out that there had been a layoff at the Monroe facility. Thus, the Monroe employees were aware of the facilities past layoff history so that the initial Lewis statement could not have been perceived by them as coercive or threatening. At worst, Lewis' initial statement was mistaken, and the error was quickly pointed out. Further, to the extent that that the Respondent was saying that layoffs occur at unionized facilities, and not at non-Union facilities, the Respondent was expressing its view that this was because of the strictures of union contracts, rather than unionization per se, i.e., there were lawful reasons for these layoffs.[2]

As to the alleged threat to reduce hours, my colleagues concede that there was no such threat. To the contrary, they say that the Respondent was taking the position that, with a union, the Respondent would *not* have the flexibility to reduce hours. Hence, in lieu of a reduction of hours, the Respondent would have to layoff employees in the event of an economic difficulty. However, an alleged threat of layoff is not the same as an alleged threat to reduce hours. Simply stated, there was no threat to reduce hours.

Nor was there an unlawful threat to lay off. The Respondent was experiencing economic difficulty, and was explaining possible responses to economic difficulties. As set forth above, the Respondent expressed its opinion that, under a union, there would not be enough flexibility to have a reduction in hours. The alternative would be to have a layoff. Thus, the layoff, rather than a reduction in hours, would be the response to economic difficulties. It would not be a reprisal for union activity. It is neither objectionable nor threatening to tell employees about those possible consequences. *Tri-Cast, Inc.,* 274 NLRB 377, 378 (1985) (employer statement that union restrictions would lessen its flexibility and competitiveness can only refer to possible restrictions that unions may seek in future bargaining and is not objectionable conduct or a retaliatory threat). Such statements, moreover, are permissible expressions of opinion protected by Section 8(c) of the Act.[3]

Steel Production Transfer Information

The judge found that the Respondent was obligated to bargain about the transfer of 175 tons of steel production from the Monroe facility to the St. Paul facility in December 2000. Based on his finding that the Respondent was obligated to bargain about that transfer, he concluded that, the Respondent further unlawfully refused to provide information about the transfer of steel production requested by the union. Contrary to the judge, the Board has found that the Respondent had no duty to bargain about the transfer of an insubstantial amount of steel production and, thus, did not violate Section 8(a)(1) and (5) of the Act. Because the Respondent was not obligated to bargain about the inconsequential transfer of 175 tons, it follows that the Respondent was not obligated to furnish information regarding steel production that was transferred or reassigned from the Monroe facility to the St. Paul facility. See *Cowles Communications*, 172 NLRB 1909 (1968) (duty to furnish information stems from the underlying statutory duty to bargain with respect to mandatory subjects of bargaining).

My colleagues nevertheless, find that the Respondent was required to provide the steel production transfer information.

My colleagues' position is simple, and it is wrong. They reason as follows: a transfer of unit work is a mandatory subject; the information concerned a transfer of work; therefore information must be supplied. However, the information here was not about some theoretical or hypothetical transfer; it was triggered by an actual and concrete transfer, and that transfer was *not* a mandatory

[2] My colleagues say that there was no express reference to "strictures of a union contract." However, it is clear that this was precisely what Lewis was referring to. Lewis said that, in a nonunion plant, the Respondent was able to unilaterally take steps to avoid a layoff, but in union plants the Respondent was constrained in the actions that it could take.

Contrary to my colleagues, the Respondent's point throughout the campaign was that, during economic downturns, layoffs had occurred at unionized facilities as a result of the Respondent adhering to the layoff procedures in the union contracts. It is evident from the cited testimony of employee Mike Carmody that employees understood that that was the Respondent's position.

[3] *Hertz Corp*., 316 NLRB 672 (1995), and *Times-Herald Record*, 334 NLRB 350 (2001), cited by my colleagues, are distinguishable. In both cited cases, the employer's statements clearly conveyed that it would take future adverse actions if the employees selected the union. Here, the limited testimony of what Lewis said about past layoffs and reduced hours cannot reasonably be construed as including an express or implicit threat of retaliatory action by the Respondent against the employees for selecting the Union.

subject. Therefore, there was no obligation to supply information about the steel production transfers.

I do not disagree that a transfer of bargaining unit work to nonunit individuals may be a mandatory subject of bargaining if it has an impact on unit work. *Regal Cinemas, Inc.,* 334 NLRB 304 (2001). But to trigger an employer's statutory bargaining obligation, it is not enough that a change involves a mandatory subject of bargaining; it also must be a material, substantial, and significant change in the terms and conditions of employment. *United Technologies Corp.*, 278 NLRB 306 (1986). In the cases cited by the majority, unlike here, the transfer of unit work was a "material, substantial, and significant" change that affected most, if not all unit employees and triggered the employer's bargaining obligation. *Dallas & Mavis Specialized Carrier Co.,* 346 NLRB No. 27 (2006) (employer terminated all unit drivers and transferred unit work to owner-operators); *Geiger Ready-Mix of Kansas City*, 315 NLRB 1021 (1994) (employer closed plant, laid off unit employees, and reassigned unit work to other plants); *St. George Warehouse, Inc.,* 341 NLRB 904 (2004) (after representation election, employer stopped hiring employees and assigned unit work to temporary employees so that the bargaining unit decreased from 42 to 8 employees). Similarly, unlike the present case, in the cited cases which find that the employer was obligated to provide the information, the union had established that the requested information was relevant to a union grievance asserting that the employer's conduct violated the terms of the collective-bargaining agreement. *Certco Food Distribution Centers*, 346 NLRB No. 102 (2006) (information relevant to union grievance that employer's newly opened facility was an accretion and that the existing labor contract applied to the new facility); *Clear Channel Outdoor, Inc*., 347 NLRB No. 47 (2006) (information relevant to union grievance that employer was subcontracting work in derogation of the collective-bargaining agreement).[4]

In these circumstances, I would not find that the Respondent violated Section 8(a)(5) by failing to provide information about the transfer of the steel production.

[4] *Somerville Mills*, 308 NLRB 425 (1992), also cited by the majority, is inapposite. There, the Board adopted, without comment, the judge's finding that the employer unlawfully refused to supply information requested by the union about the employer's subcontracting work while employees were being sent home and being laid off. The judge found that the General Counsel sustained his burden of showing the requested information was relevant to the layoffs. In contrast, the General Counsel here did not show that there were layoffs attributable to the transfer.

MEMBER WALSH, dissenting in part.

I disagree with my colleagues on three points: (1) their finding that the Respondent's unlawful failure to bargain about its decision to eliminate three unit jobs and displace three unit employees from the scrap yard was only an effects bargaining violation, requiring only a *Transmarine*[1] remedy; (2) their adoption of the judge's finding that the Respondent did not unlawfully fail to bargain with the Union about the Respondent's decision not to grant a wage increase in 2001; and (3) their finding that the Respondent did not unlawfully fail to provide the Union with requested information about the Respondent's financial situation and competitors.

I. THE SCRAP YARD

Just 2 weeks after the employees elected the Union to represent them in collective bargaining with the Respondent, the latter ignored its obligation to bargain with the Union and, without giving the Union any advance notice or opportunity to bargain, unilaterally decided to eliminate three unit jobs from the scrap-yard department and correspondingly to displace three scrap-yard unit employees into the Respondent's general labor pool.

A.

Historically, the Respondent moved steel in its scrap yard by using two cranes and a locomotive. There were four scrap-yard shifts, with three employees working each shift: two operated the cranes, and the third operated the locomotive. In a May 1999 memorandum, the Respondent informed employees that it was considering eliminating the cranes, and reducing manpower by one employee per shift. The memorandum also stated, however, that the Respondent would publish and communicate the results of its feasibility study of these possible changes as they developed, "well before any decisions would be made which affected the total number of individuals" in the scrap yard.

About a year later, in April 2000,[2] the Respondent ordered two front-end loaders for a new system of handling scrap that would replace the cranes-and-locomotive system. By August, the Respondent was operating the scrap yard under its new method, with front-end loaders.

At some point during the transition period in scrap-yard operations, Supervisor Toni Hallam spoke with scrap-yard employees about rumors that the scrap-yard positions were not secure because of the change to the new scrap-handling system. Hallam told the employees that all they had to go on was the Respondent's past

[1] *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

[2] All dates in this section are in 2000, unless stated otherwise.

practice, under which the Respondent only eliminated jobs through attrition of the employees.

At the time of the Union's election and certification in late September, there were still three scrap-yard unit *positions* on three of its shifts, but just two on the fourth. And the Respondent was still essentially using three scrap-yard *employees* per shift: two to operate the front-end loaders and (on three of the four shifts) a third to help relocate scrap within the yard to accommodate the new system.[3]

In October, however, shortly after the Union's election as bargaining representative, Superintendent Barbara Nocella told Hallam that the Respondent was going to eliminate three positions in the scrap yard. On October 18, Nocella and Hallam gave written notification to the three most junior scrap-yard employees, Cheryl Hoffman, Troy Daniels, and Scott Lambrix, that they were being displaced from the yard.[4] Nocella told them that the action was the result of the downturn in the Respondent's business and the new, more efficient, scrap-handling system. Hoffman said "I thought you said our jobs were secure," and Hallam responded that "things have changed." The Respondent did not give the Union advance notice or an opportunity to bargain prior to eliminating the positions and displacing the incumbents.

B.

The judge found that although by the time of the Union's election in September the Respondent was operating the scrap yard under its new method with new equipment, the status quo in terms of unit positions and employees at that time was still 11 unit positions and 11 employees, and did not include the elimination of the three positions and the displacement of the three employees. Thus, the judge found that the Respondent's implementation of the *equipment and operational changes* in the scrap yard prior to the Union's election did not relieve the Respondent of its obligation to bargain with the Union before deciding to make the *manpower and personnel reductions* in question after the election.

I agree with the judge's analysis. The record establishes that while the Respondent's decision to change scrap-yard equipment and operations was made before unionization, its decision to eliminate three scrap-yard positions and displace three employees was not made until after unionization. The Respondent told the employees prior to unionization that it would communicate and publish the results of its scrap-yard feasibility study well before making any decision that would affect the number of employees in the scrap yard. But no such results were published or communicated prior to unionization, and, presumably then, no such resulting decision had been made by that time. Later, but still prior to unionization, Supervisor Hallam reassured the scrap-yard employees that under the Respondent's established practice, scrap-yard positions would only be eliminated as a result of the attrition of scrap-yard employees. But only one employee had left the scrap yard prior to unionization, and only that one scrap-yard position had been eliminated by that time. The Respondent did not eliminate the three positions in question and displace the three employees until after the Union's election, by which time, of course, the Respondent had an obligation to bargain with the Union about changes in unit employees' terms and conditions of employment. Thus, the 8(a)(5) and (1) violation here was the Respondent's failure to bargain with the Union about this post-unionization decision affecting the bargaining unit.[5] Accordingly, the judge correctly recommended that the Respondent be required to (1) restore the status quo ante by rescinding the elimination of the unit positions and the displacement of the employees, (2) offer the displaced employees full and immediate reinstatement to their former positions in the scrap yard, (3) make them whole for any lost pay and benefits resulting from the Respondent's unlawful actions, and (4) bargain in good faith with the Union about the elimination of the positions and displacement of the employees.[6]

While my colleagues agree that the Respondent violated Section 8(a)(5) and (1) by failing to bargain about eliminating the unit positions and displacing the unit employees, they disagree with the judge and me about the *nature* of the Respondent's bargaining obligation,

[3] As to the fourth shift, one of the scrap-yard employees on that shift had transferred to another assignment in late 1999 or early 2000, and the Respondent had not replaced him.

[4] Nocella told the three displaced employees that they would be in the "labor pool," which meant they would be assigned wherever they were needed within the Monroe facility.

[5] See, e.g., *Wackenhut Corp*., 345 NLRB 850 (2005) (unilateral elimination of unit positions, unlawful); *Sartorius, Inc*., 323 NLRB 1275 (1997) (same); *Gratiot Community Hospital*, 312 NLRB 1075 (1993), enfd. mem. in pertinent part 51 F.3d 1255 (6th Cir. 1995) (same); *Southern Mail, Inc.*, 345 NLRB 644 (2005) (unilateral reassignment of route drivers to the extra board, unlawful); *King Soopers, Inc*., 295 NLRB 35 (1989) (unilateral transfer of employee out of unit, unlawful); *San Antonio Portland Cement Co*., 277 NLRB 338 (1985) (unilateral reassignment of unit employees, unlawful).

[6] See, e.g., *Tri-Tech Services,* 340 NLRB 894 (2003); *Ebenezer Rail Car Services*, 333 NLRB 167, 172 (2001); *Westinghouse Electric Corp.*, 313 NLRB 452 (1993), enfd. mem. sub nom. *Salaried Employees Assn. of Baltimore Division v. NLRB*, 46 F.3d 1126 (4th Cir. 1995) cert. denied 514 U.S. 1037 (1995); *Holmes & Narver*, 309 NLRB 146 (1992), *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th cir. 1990); *Lapeer Foundry & Machine Co.*, 289 NLRB 952, 955–956 (1988). Cf. *Consolidated Printers, Inc.*, 305 NLRB 1061 (1992) (no duty to bargain over layoffs where the decision to lay off had been made prior to the election of the union).

and thus about the appropriate remedy for the Respondent's failure to meet it. They find that the Respondent's postunionization elimination of the unit positions and displacement of the unit employees were actually only effects of the Respondent's preunionization change in scrap-yard equipment and operations. Accordingly, they find that the Respondent had only an effects bargaining obligation. Consequently, they find that the judge erred in recommending a make-whole remedy, and they impose a *Transmarine* remedy instead. But as seen above, while the Respondent was operating the scrap yard with new equipment and methods as early as August 2000, prior to unionization, the record does not show that the Respondent had already also decided by then to eliminate three unit positions and displace three unit employees. On the contrary, as shown above, the record establishes that the Respondent did not make that decision until later, in October, by which time the Union had been elected and the Respondent had a corresponding obligation to bargain. Under the above-cited precedent, the judge has correctly recommended a status quo ante and make-whole remedy for the Respondent's failure to bargain about this decision.

In ordering only a *Transmarine* effects-bargaining, limited backpay remedy, my colleagues cite *Fast Food Merchandisers, Inc.*, 291 NLRB 897, 899–902 (1988), and *Litton Business Systems*, 286 NLRB 817, 821–822 (1987), enfd. in relevant part 893 F.2d 1128 (9th Cir. 1980). *Fast Food*, however, is distinguishable and *Litton* is inapposite.

In *Fast Food*, the union represented the employer's warehouse employees at its LaGrange, Georgia food distribution facility. LaGrange serviced most of the Florida restaurants of the employer's parent company, Hardee's Food Systems. In December 1980, the employer decided to (1) open a new food distribution center in Jacksonville, Florida, to take over servicing most of Hardee's Florida restaurants from LaGrange, and (2) discontinue the third shift at LaGrange. Within the next few weeks, by the end of the month, the employer (1) started operating at Jacksonville, (2) transferred the servicing of most of the Florida restaurants from LaGrange to Jacksonville, (3) hired three warehouse employees at Jacksonville, and (4) unlawfully unilaterally discontinued the third shift and discharged three third-shift warehouse employees at LaGrange.

Although the Board found that the employer unlawfully failed to bargain about its decision to discontinue the third shift and discharge the third-shift employees at LaGrange, the Board did not adopt the judge's remedial recommendation that the employer be ordered to reestablish the third shift and reinstate and make whole the discharged employees. Instead, it found that the employer's decision to start up Jacksonville and transfer LaGrange work there (the Jacksonville decision) was "the clearly defined management decision" that produced the unlawful decision to eliminate the third shift and discharge the three warehouse employees at LaGrange (the LaGrange decision). Thus, the Board found that the unlawful LaGrange decision was but a "direct effect" of the contemporaneous Jacksonville decision.[7] Consequently, the Board found that only a *Transmarine* remedy for the unlawful LaGrange decision was appropriate "under the circumstances."[8]

Here, however, unlike in *Fast Food* and contrary to my colleagues, the Respondent's April decision to change equipment and methods of operation in the scrap yard[9] cannot reasonably be found to have been a "clearly defined management decision" that produced the Respondent's unlawful October decision 6 months later (or, under my colleagues' view, 8 months later) to eliminate the three scrap-yard positions and displace the incumbents. Indeed, the Respondent had been operating the scrap yard with the *new* equipment and methods since August, while keeping the *same number* of positions and employees as before. The Respondent did not ultimately decide to eliminate the three scrap-yard positions and displace the incumbents until 6 months after it decided to change the equipment and method of operation in the scrap yard, and 2 months after it actually started to operate the scrap yard with this new equipment under these new methods. Under these circumstances, the Respondent's unlawful October decision to eliminate scrap-yard jobs and displace incumbents was not a "direct effect" of its decision 6 months earlier to change scrap-yard equipment and methods, and the Respondent's unlawful failure to bargain about its October decision warrants the reinstate-

[7] There was no allegation that the employer was obligated to bargain about the Jacksonville decision to start operating there and transfer LaGrange work there; only the lawfulness of the subsequent unilateral LaGrange decision to eliminate the third shift and discharge the three warehouse employees at LaGrange was at issue. Likewise, there is (of course) no allegation in the instant case that the Respondent was obligated to bargain about its earlier, April 2000 preunionization decision to change equipment and methods of operation in the scrap yard; only the lawfulness of the subsequent, October 2000 postunionization unilateral decision to eliminate the three scrap-yard positions and displace the incumbents is at issue here.

[8] Specifically, the Board ordered the employer to bargain over its discontinuation of the LaGrange third shift and discharge of employees "as effects of its decision to open the Jacksonville facility."

[9] My colleagues place this decision earlier, in February. The result that I reach in this case does not depend on whether the Respondent's decision to change equipment and methods of operation in the scrap yard was made in February or April.

ment and make-whole remedy recommended by the judge.[10]

II. THE DECISION NOT TO GRANT A WAGE INCREASE

A.

In the 12 years (1989–2000) prior to the Union's election as collective-bargaining representative in September 2000, the Respondent granted 11 annual wage increases, at the beginning of each calendar year.[11] Following the Union's election, however, the Respondent unilaterally decided not to grant a wage increase in 2001, without giving the Union advance notice and an opportunity to bargain about that decision.

B.

The judge concluded that the Respondent did not violate Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about the decision not to grant a wage increase in 2001. He found that the record did not establish that an annual wage increase was the status quo for the 18 years (1983–2000) prior to unionization. Because the Respondent had not granted wage increases when it was assertedly experiencing economic difficulty in the earlier years, 1983–1984 and 1986–1988, the judge found that annual wage increases were "certainly not" the status quo during periods when the Respondent's business was poor. The judge found that the Respondent's business was poor in 2000 and 2001 (although, as seen, the Respondent in any event did grant a wage increase at the beginning of 2000). Thus the judge found that the Respondent's failure to bargain about its decision not to grant a wage increase in 2001, following unionization, did not violate the Act because it did not constitute a unilateral change to the status quo. For the reasons set forth below, I disagree with the judge and find that the Respondent violated the Act.

C.

Once a union has been selected to represent an appropriate unit of employees, the employer may not make decisions regarding any term and condition of employment without first notifying the union and providing it with the opportunity to bargain. E.g., *Britt Metal Processing, Inc.*, 322 NLRB 421 (1996), affd. mem. 134 F.3d 385 (11th Cir. 1997). The Respondent granted annual wage increases in 11 of the 12 years (92 percent of the time) immediately preceding the Union's election in September 2000. Thus, by the time the Union became the collective-bargaining representative, these annual wage increases had become an established pattern and practice over many years and therefore constituted a condition of employment which the Respondent was not free to change unilaterally.[12] *Lee's Summit Hospital & Health Midwest*, 338 NLRB 841 (2003); *Keeler Die Cast*, 327 NLRB 585, 588 (1999) (8(a)(5) violation).[13] Given the consistency of the Respondent's practice, the employees were entitled to regard an annual wage increase as an established part of their wage structure. (Indeed, that is precisely what the Respondent *wanted* the employees to understand.)[14] And this is so even though there may have been discretion in the amount of the annual increases, *Lee's Summit*, supra, 338 NLRB at 843,[15] and even though a $1000 bonus was granted in lieu of an increase in 1998, assertedly due to economic conditions. Id. Consequently, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about the decision not to grant a wage increase in 2001.

[10] In *Litton Business Systems*, supra, also relied upon by my colleagues, there was no allegation that the employer had anything more than an effects-bargaining obligation. The issue in dispute between my colleagues and me here, however, is whether the Respondent had a *decision*-bargaining obligation. Thus, *Litton* is inapposite.

[11] In 1998, the Respondent granted an across-the-board $1000 bonus in lieu of an annual wage increase.

[12] This consistent pattern of annual wage increases in 11 of the 12 years immediately before the Union's election is more probative of the existence of such increases as an established term and condition of employment at the time of the election than the *absence* of such increases in 5 of the 6 earlier years *before* that period. But even going all the way back to 1983, as the judge did, the Respondent still granted wage increases in 12 of the 18 years (67 percent of the time) before 2001.

[13] See also *UARCO, Inc.*, 283 NLRB 298, 300–301 (1987) (8(a)(5) violation) (employer unlawfully withheld wage increase to newly represented employees who had received increases equal to those of competitor for previous 17 years).

[14] Human Resource Manager Todd Dean testified that one of the Respondent's antiunion "selling points" to employees during the Union's election campaign in September 2000 was that the Respondent had granted the employees "continua[l] wage increases." Also during the campaign, the Respondent trumpeted on its "Union Free" website that the Respondent had a "[c]onsistent history of wage increases averaging 3% per year *since 1990,*" and (in another place on the website) a "3% average annual increase *the last 11 years*." (Emphasis added.)

[15] See also *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997) (employer that had practice of granting merit increases that were fixed as to timing but discretionary as to amount violated the Act by unlawfully discontinuing that practice without bargaining to agreement or impasse with union (applying *NLRB v. Katz*, 369 U.S. 736 (1962)). Thus, to the extent that the Respondent decided in its discretion not to grant the regular wage increase in 2001 because of financial considerations, the Respondent was nevertheless obligated to bargain with the Union over the discretionary issue of whether to grant the increase in light of financial considerations. See, e.g., *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973) (an employer with a preunionization history of a merit increase program may no longer continue unilaterally to exercise its discretion with respect to such increases following unionization; the implementation of the merit increase program, to the extent that discretion has existed in determining the amounts or timing of such increases, becomes a matter as to which the bargaining agent is entitled to be consulted).

III. THE REFUSAL TO PROVIDE INFORMATION

The judge correctly found that the Respondent's negotiation statements effectively claimed a present inability to pay and also put information about its competitors in issue, and that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish the Union with requested financial and competitor information. I disagree with the majority's reversal of these findings.

A.

In October 2000,[16] shortly after the employees elected the Union to represent them in collective bargaining, the Respondent unilaterally reduced weekly production from 21 work shifts to 15, and announced to the employees that it was cutting their weekly hours from 40 to 32. The Respondent did not give the Union advance notice or an opportunity to bargain about the decisions to impose these reductions.[17] The last time the Respondent had taken such steps was 14 years earlier, in response to financial difficulties.

Thereafter, on October 24, the Union asked the Respondent to provide it with, inter alia, income statements for the last 3 full years; general and administrative expenses, including details on management salaries and benefits; operating plans, budgets, forecasts or other documents dealing with projected costs and operating results; and a list of all the Respondent's competitors, including company name, address, and whether they are unionized, and also any wage and benefit information that the Respondent had about them.

A week later, on November 1, the Respondent and the Union had a meeting about the reduction in work hours. The Respondent told the Union that there was a downturn in the steel industry, and that the Respondent's sales orders were "extremely low," "looking bleak," and "a cause for great concern." The Respondent also told the Union that sales prices were falling because of increased competition from several "effectively bankrupt" competitors who needed cash quickly and were struggling to get some cash by lowering their prices to increase their sales volume. At this meeting, the Respondent gave the Union manufacturing and financial data for the years 1999 and 2000.[18]

At a meeting on December 6, the Respondent told the Union that the Respondent's business had deteriorated further since the previous meeting, that it was continuing to deteriorate quickly ("really going south in a hurry"), that the Respondent might show a loss ("in the red") for that month, and that there was going to be a layoff.

On December 23, in response to the Union's October 24 request for information about the Respondent's competitors, the Respondent provided only a copy of the commercially published 2000 edition of "The Directory of Iron and Steel Plants." The directory listed over 100 facilities, but the Respondent did not identify which companies were the Respondent's competitors.[19] The Respondent did not provide anything in response to the request for income statements for the last 3 years or the request for information about management salaries and benefits. The Respondent took the position that information about management salaries and benefits was not relevant to the Union's bargaining obligation in the contract negotiations.

Finally, at a meeting on January 4, 3 days before the start of the layoff, the Respondent told the Union that the Respondent's business outlook continued to be bleak.

B.

Contrary to my colleagues, I agree with the judge that during the Respondent's above meetings with the Union the Respondent effectively raised a claim of inability to pay for wages and benefits that the Union might seek for the employees, and to justify concessions from the Union.

An employer is required to comply with a union's request for financial information to verify the employer's claim of economic inability to pay the union's bargaining demands.[20] There are no magic words required to trigger this obligation; rather, "so long as the employer's refusal reasonably interpreted is the result of financial inability to meet the employees' demand rather than simple unwillingness to do so, the exact formulation used by the employer in conveying the message is immaterial."[21]

Here, the Respondent clearly communicated to the Union that it could not afford the Union's bargaining demands. It conveyed to the Union that it was caught in a

[16] All dates in this section are October 2000 through January 2001, unless stated otherwise.

[17] As a result of postfacto discussions with the Union, however, the Respondent postponed implementation of the reduction in work hours for about a month.

[18] As my colleagues note, later that month, the Union did notify its members that the Respondent had provided comprehensive data surrounding the Respondent's current business conditions, including, inter alia, information about shipments, net income, current and projected production schedules, and inventory and order backlogs.

[19] The Respondent actually had only four primary competitors among the over 100 companies listed in the directory. The Respondent had information about the wages being paid by one of those competitors, but the Respondent did not provide it to the Union.

[20] *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 152–153 (1956).

[21] *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984); *Stamco Div.*, 227 NLRB 1265 (1977). See also *Printing Pressmen Local 51 (Milbin Printing) v. NLRB*, 538 F.2d 496, 500 (2d Cir. 1976); *NLRB v. Unoco Apparel, Inc.*, 508 F.2d 1368, 1370 (5th Cir. 1975) (statement that "employees came to the wrong well . . . the well is dry" constituted a claim of financial inability to afford wage increase).

rapidly, downwardly spiraling financial trap (i.e., extremely low sales orders that were looking bleak and were a cause for great concern, coupled with falling sales prices caused by increased competition from cash-starved, virtually bankrupt competitors who were dragging down market prices to increase their volume). The Respondent made alarming statements to the Union about the Respondent's increasingly desperate current and future operational and financial condition. These statements were coupled with thinly veiled predictions of unprofitability and even bankruptcy and were made in the context of the Respondent's substantial reductions in work shifts and work hours, and ultimately, a layoff. They therefore constituted, en toto, a claim of inability to pay, and in turn triggered an obligation on the part of the Respondent to provide the Union with the requested financial and competitor information. In sum, the reasonable interpretation of the Respondent's above statements and conduct is that it was financially unable—not just unwilling—to acquiesce in the Union's negotiating demands.[22] The Respondent's failure to provide the requested information thus violated Section 8(a)(5) and (1) of the Act.

In reversing the judge and dismissing this allegation, my colleagues rely on the recent majority opinions in *AMF Trucking & Warehousing*, 342 NLRB 1125 (2004), and *Richmond Times-Dispatch*, 345 NLRB 195 (2005). Both of those cases were wrongly decided, as fully explained in Member Liebman's and my separate dissenting opinions in *Richmond Times-Dispatch* and *AMF*, respectively. Like the Board majorities in those cases, the majority seems to be bending over backwards in this case to reinterpret and recast the Respondent's clear claim of inability to pay. Thus, the majority finds that the Respondent's above statements and predictions amounted to just a claim by the Respondent that it needed concessions from the Union only in order to avoid being placed at a competitive disadvantage in the marketplace. But that clearly understates the import of the Respondent's statements and conduct, which just as clearly conveyed to the Union that the Respondent needed concessions from the Union just to survive. My colleagues' spinning and recasting of the Respondent's comments, while arguably adroit,[23] cannot defuse those comments into merely a composite claim of unwillingness to pay, based on a desire only to avoid being placed at a competitive disadvantage. And contrary to my colleagues' implication, the fact that the Respondent pinned its assertedly precarious financial condition on low sales volume and low sales prices caused by a decline in the steel industry in general, not only does not change the message conveyed to the Union, it underlines it—the Respondent would no longer be able to afford to operate at preunion levels and would not be able to continue to survive in the weakened marketplace without concessions from the Union.

Accordingly, I respectfully disagree with my colleagues, and would adopt the judge's finding that the Respondent's negotiation statements effectively claimed a present inability to pay, and that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish the Union with requested financial information.[24]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with different or unfavorable treatment if you engage in union or protected concerted activity.

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[22] See, e.g., *Shell Co.*, 313 NLRB 133 (1993) (economic conditions had affected the company "very badly" and rejection of the union's economic demands was a matter of "survival"): *Stamco Division,* 227 NLRB 1265, 1266 (1977) (employer not in healthy position, projections of the future did not look great).

[23] For example, my colleagues seem to transform the Respondent's warning to the Union that the Respondent was "great[ly] concern[ed]" about its "extremely low" future production orders, in a market where "prices are falling" and three of the Respondent's competitors were "effectively bankrupt," into an implicit *boast by the Respondent* that it had an advantage over its competitors and could still pay its employees—all of this, however, in the context of the Respondent's contemporaneous reductions in work shifts and hours, and its eventual layoff of employees. The Respondent's above statements to the Union were just what the Respondent intended them to be: a clear warning to the Union that the Respondent was unable to meet any union demands for improvements and would follow its competitors into bankruptcy in a weakened marketplace unless the Respondent got concessions from the Union.

[24] Also contrary to my colleagues, and for the reasons set forth by the judge in sec. III,D,2 of his attached decision, I would adopt his finding that the Respondent violated Sec. 8(a)(5) and (1) under these circumstances by failing to provide the Union with information in the Respondent's possession about its competitors.

WE WILL NOT threaten you that we would not have flexibility to choose between reduced hours and layoffs in economic downtimes if the employees at our Monroe facility became unionized.

WE WILL NOT make statements to you implying that collective bargaining with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO will be futile.

WE WILL NOT refuse to bargain with the Union, as the exclusive bargaining representative, with respect to the effects of the decision to change scrap-yard equipment at our Monroe, Michigan facility in August 2000 on the following unit of employees:

> All full-time and regular part-time production and maintenance employees, including stores employees, shipping and receiving employees, and quality assurance employees, employed by us at our Monroe facility; but excluding all metalographers, department clerks/plant clerical employees, draftsmen, office clerical employees, electronics technicians, professional employees, supervisors and guards as defined in the Act.

WE WILL NOT significantly increase from preelection levels the proportion of square stacking work performed using outside contractors rather than bargaining unit employees, without us first giving the Union notice and a reasonable opportunity to bargain.

WE WILL NOT fail to provide the Union, in a timely fashion, with information regarding steel production being transferred or reassigned from our Monroe, Michigan facility to our St. Paul, Minnesota facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with the Union with respect to the effects of the decision to change scrap-yard equipment at our Monroe, Michigan facility in August 2000 on unit employees, and reduce to writing and execute any agreement reached as a result of such bargaining.

WE WILL, on request, bargain in good faith and collectively with the Union regarding significantly increasing from preelection levels the proportion of square stacking work performed by outside contractors rather than Monroe bargaining unit employees.

WE WILL pay to employees Cheryl Hoffman, Troy Daniels, and Scott Lambrix, who were displaced from their yard-operator positions, limited backpay in the manner set forth in the Board's Decision.

WE WILL, on the request of the Union, rescind the increase in the proportion of square stacking work performed using outside contractors rather than Monroe bargaining unit employees, and make whole any employees who have suffered losses as a result of that increase, with interest.

WE WILL, on request, furnish the Union, in a timely fashion, with information regarding steel production being transferred or reassigned from the Monroe, Michigan facility to the St. Paul, Minnesota facility.

NORTH STAR STEEL COMPANY

John Ciaramitaro, Esq., Dynn Nick, Esq., and *Kelly Gacki, Esq*., for the General Counsel.
Vincent Candiello, Esq. (Morgan, Lewis & Bockius LLP), of Harrisburg, Pennsylvania, for the Respondent.
Betsey A. Engel, Esq. and *Niraj R. Ganatra, Esq.,* of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Detroit, Michigan, on December 11, 12, 13, and 14, 2001. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the Union or UAW), filed the initial charge on December 19, 2000, and amended that charge on February 9 and March 29, 2001. The Union filed additional charges on April 3 and May 31, 2001. The Director for Region 7 of the National Labor Relations Board (the Board) issued the initial complaint on March 30, 2001, the amended consolidated complaint on May 30, 2001, and the second amended consolidated complaint on August 8, 2001. The second amended consolidated complaint (the complaint) alleges that North Star Steel Company (the Respondent) violated the National Labor Relations Act (the Act) by taking various actions at its facility in Monroe, Michigan, both before and after a representation election in which employees selected the Union as their exclusive collective-bargaining representative. The unlawful conduct in which the Respondent is alleged to have engaged includes, inter alia: threatening its employees with adverse consequences if they chose the Union as their collective-bargaining representative; coercively interrogating an employee about the Union; giving employees the impression that union activities were under surveillance; promulgating an overly broad no-discussion rule; and, eliminating three positions in its scrap yard because of employees' union and protected activities. The complaint further alleges that, after the Union was certified as the collective-bargaining representative of a unit of employees, the Respondent refused the Union's request for financial and other information relevant to bargaining, and failed to bargain with the Union regarding subjects that included: the elimination of three positions in the scrap yard; the failure to give an annual wage increase; the transfer of work from the Respondent's facility in Monroe, Michigan, to its facility in St. Paul, Minnesota; the subcontracting and outsourcing of certain work previously performed by members of the bargaining unit; the reduction in employees' hours; and the layoff of employees. The Respon-

dent filed an answer and amended answers in which it denied that it had committed any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Monroe, Michigan, is engaged in the manufacture and nonretail sale of steel at its Monroe facility, where it annually derives gross revenues in excess of $1 million sells goods valued in excess of $50,000 to customers located outside the State of Michigan, and causes such goods to be shipped from the Monroe facility directly to points located outside the State of Michigan.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates steel mills in a number of states, including Arizona, Iowa, Kentucky, Michigan, Minnesota, Ohio, and Texas. This case involves alleged violations at the Respondent's steel mill in Monroe, Michigan. The Respondent's Monroe facility produces a number of different types of steel products, but concentrates primarily on high quality engineered steel that is used in the automotive industry. The facility also produces a smaller amount of "merchant" grade and "rebar" grade steel that is used primarily in the construction industry. As of late 2000, the Respondent employed over 300 persons at the Monroe facility. The Respondent is associated with Cargill Steel International (Cargill), most probably as a subsidiary of Cargill.[1]

In the year 2000, the Union engaged in a campaign to organize employees at the Monroe facility. This campaign culminated with an election on September 21, 2000, in which employees selected the Union as their collective-bargaining representative. On September 29, 2000, the Union was certified as the exclusive collective-bargaining representative of a unit of employees at the Monroe facility.[2]

B. Deterioration of Business Conditions Affecting the Monroe Facility

The state of the Monroe facility's business began to worsen some months before the union election. Management at the facility first noticed the decline early in the year 2000, and the downturn became more pronounced by June of that year. The Respondent's sales and backlog of outstanding orders were decreasing and its inventory of finished product was growing. The problem of reduced sales was compounded by declines in the selling price of its product and increases in the cost of raw materials. Mike Roper, who has worked at the Monroe facility since it began operating and became its works manager in 1999, testified without contradiction that the recent downturn was the bleakest period in the 22-year history of the Monroe facility.

In an effort to improve its financial condition, the Respondent: tried to reduce costs by buying raw materials through internet bidding; initiated capital projects designed to reduce operating costs; encouraged customers to take delivery on product they had already committed to buy; reduced the inventory of spare parts; attempted to raise prices for its products by performing additional "finishing" work; and reduced its welding workforce through attrition. In August 2000, the Respondent began to curtail production at the Monroe facility. That facility had previously functioned 24 hours a day, 7 days a week, but now the Respondent would at times idle operations in certain departments.

C. Events Leading up to the Election

David Lewis was vice president for human resources at Cargill Steel during the union campaign at the Monroe facility.[3] Over the course of several days, approximately 1 week before the election, Lewis conducted a series of a dozen or more meetings with employees at which he discussed the union campaign. Each employee was required to attend a particular meeting based on a schedule posted at the Monroe facility. The meetings were held at the Monroe facility and lasted approximately 1 hour. Each meeting was attended by as many as 30 or more hourly employees as well as by a smaller contingent of management and supervisory personnel. Lewis gave a presentation at each meeting that communicated the same general information, but varied somewhat in its particulars from meeting to

[1] The briefs filed by the General Counsel and the Union both state that the Respondent is a subsidiary of Cargill, but neither provides record citations that establish that to be the case. The record does contain evidence that suggests the Respondent is a subsidiary of Cargill. For example, the evidence showed: that the Respondent's officials received direction from a Cargill official, that a Cargill official addressed the Respondent's employees regarding the union campaign, that in-house counsel from Cargill conducted negotiations with the Union about subjects affecting the Monroe facility, and that the Monroe plant was referred to by management officials as one of the facilities "within Cargill."

[2] The unit of employees represented by the Union consists of:

> All full-time and regular part-time production and maintenance employees, including stores employees, shipping and receiving employees, and quality assurance employees, employed by Respondent at its Monroe facility; but excluding all metalographers, department clerks/plant clerical employees, draftsmen, office clerical employees, electronics technicians, professional employees, supervisors and guards as defined in the Act.

[3] At the time of trial Lewis had left this position with Cargill for a job with a company unaffiliated with the Respondent. The General Counsel argues that I should draw an adverse inference from the Respondent's failure to call Lewis as a witness at trial. GC Br. 39. However, such an inference is only proper if it can reasonably be assumed that Lewis is favorably disposed to the Respondent. See *International Automated Machines,* 285 NLRB 1122, 1123 (1987). Since the circumstances of Lewis' departure from the position with Cargill were not explored by either party, I cannot assume that he would be favorably disposed to the Respondent. Indeed, there was no record evidence showing that the Respondent even knows how to contact Lewis. Given those circumstances, I decline to draw any inference based on the Respondent's failure to present Lewis as a witness.

meeting. Lewis also responded to employee questions and comments.

At the meetings, Lewis identified himself as the person who would be the lead contract negotiator for management if the workforce became unionized. He said that he would consider himself "a failure" if the Union succeeded in improving things for Monroe employees to the extent that unionization became attractive to employees at the Respondent's remaining union-free facilities. He would negotiate, he said, "to the point that [other nonunion facilities] wouldn't say 'look at what [Monroe,] Michigan received.'" The Respondent "could not afford," he said, "to have the freight train effect roll down to our other facilities and have these other facilities see monetary wages and gains here." (Tr. 423.) During at least one meeting he stated that he would not allow the Union to "succeed" at the Monroe facility, and that if employees "were to get the Union in and get a contract, if you have what you have right now, we would consider that . . . succeeding and we do not want that to happen because we're afraid of the domino effect [on] other nonunion plants."[4] (Tr. 352.) Lewis said that there was a 22-year relationship between management and hourly workers at the Monroe facility and that a third party was now trying to interfere with that relationship. He compared the relationship to a "marriage," and said that if the employees selected the Union to represent them, it would be a "bad divorce."

Lewis discussed two programs that were in place at the Monroe facility: the employee stock ownership program or "ESOP" and the insurance plan subsidizing medical coverage for retired employees. During the organizing campaign the Respondent distributed a communication to employees regarding the stock program. The communication stated: "If a union were successful in organizing this facility, the [existing] ESOP plan would become a negotiable benefit. *However, no unionized facility within Cargill has ever been successful in continuing their ESOP plan through negotiations*." (R. Exh. 33 (emphasis in original).) A communication issued on September 8, 2000, prior to the meetings conducted by Lewis, explained that if the facility became unionized the stock plan would be continued until a collective-bargaining agreement was ratified and that if such a plan was not included in the final contract then contributions to the plans would cease, but employees would "continue to earn dividends and enjoy the growth of the stock" previously allocated to their accounts. Questions about the stock plan were raised at the meetings with Lewis. Lewis, stated that continuation of the stock plan would have to be negotiated if the facility was unionized, but that the Respondent would bargain very hard regarding that subject and that no unionized facility within Cargill had such a plan.[5]

Regarding medical insurance for retirees, Lewis stated that Cargill had a plan to eliminate this benefit throughout all its facilities by 2010 or 2012.[6] This phase-out had been an-

[4] The General Counsel alleges that Lewis told employees that, if they selected the Union as their representative, bargaining would start at zero. (Complaint par. 14.) This allegation is supported by the testimony of Gregory Kirk, a member of the union bargaining committee, who stated that Lewis said if the Union prevailed in the election, "we would start at zero in negotiations and go from there." None of the other witnesses for the General Counsel corroborated Kirk's account or recounted a similar statement. James Jonasen and Todd Dean, management officials who were present at the meeting that Kirk attended, both stated that they did not remember Lewis stating that negotiations would "start at zero." Kirk had a credible demeanor although he was somewhat defensive during cross-examination. However, I found Dean an equally credible witness based on his demeanor and testimony. In more than one instance during his testimony, Dean admitted that he did not recall events alluded to by the Respondent's counsel even though positive testimony would have buttressed the Respondent's position. I found Jonasen a somewhat less credible witness because his recollection was imprecise and he was occasionally evasive during cross-examination. Given the testimony of Dean and Jonasen, and the absence of testimony corroborating Kirk's account, I conclude that the General Counsel has failed to establish that Lewis said negotiations with the Union would start at zero.

[5] Cheryl Hoffman, an alleged discriminatee in this case, testified that Lewis said if the union campaign was successful the stock plan "would be stopped immediately." Tr. 368. I do not credit this testimony. It was not corroborated by any other witness and is contrary to the prior written communication that the Respondent made to employees assuring them that if the Union won the election the stock plan would remain in effect until a contract was negotiated. Hoffman's account is also in conflict with the testimony of Jonasen who attended every one of the presentations given by Lewis and testified that Lewis said the stock plan would be negotiable if the employees unionized, but that no unionized plant had such a stock plan. Tr. 922. I did not find Hoffman a very credible witness based on her demeanor and testimony. She had been displaced from her position in the Respondent's scrap yard on two separate occasions and appeared overanxious to testify unfavorably about the Respondent's behavior. In several instances her testimony was demonstrated to be erroneous. For example, in support of the General Counsel's position that yearly wage increases were standard at the Monroe facility, Hoffman stated that she had been with the Respondent for 15 years and that the Respondent had given a wage increase every year except 2001—i.e., immediately after the employees became unionized. Tr. 359, 379. However, the credible evidence showed that no wage increases had been granted in 1986, 1987, 1988, and 1998. GC Exh. 38; Tr. 811–812. Hoffman testified that the front-end loaders were put into operation in the scrap yard approximately 6 or 7 months prior to the union election, i.e., in February or March 2000. That timing would tend to undercut the Respondent's claim that positions in the yard were eliminated in October due to the change to a new scrap handling system using the front-end loaders, and not because of the union election. However, the evidence shows that, contrary to Hoffman's testimony, the two front-end loaders were not even ordered until April 2000. The first was not delivered to the Respondent until June 2000, and the second until July or August 2000. The front-end loaders were not assembled and operational until August 2000.

Willie Hall, a current member of the union bargaining committee, Tr. 178–179, described Lewis' presentation and recounted that "[h]e said we wouldn't have ESOP, no unionized plant has ESOP." Tr. 343. It is not clear from Hall's testimony whether he was summarizing what he understood to be the gist of Lewis' statements, or whether he meant that Lewis explicitly said that if the facility became unionized the employees "wouldn't have ESOP." To the extent that Hall's testimony was that Lewis explicitly stated that the stock plan would be discontinued if the facility became unionized, I do not credit that testimony, which lacked detail, was not corroborated by other credible testimony, and was contrary to Jonasen's testimony that what Lewis said was that the stock plan would be "negotiable." Tr. 922.

[6] Under the existing program, retired employees could maintain their health insurance by paying the same premium paid by current hourly employees.

nounced several years before the representation election at the Monroe facility. Lewis said that the Respondent's management tried to convince senior Cargill officials, including the chief financial officer, to continue the retiree health care plan for hourly employees, but the request had been denied. Lewis said that "union or no union" this "was an issue that Cargill was taking a very firm stand on." (Tr. 921.) He told the employees at one meeting that "[i]f you think getting a union in here will get your medical retirement, you're wrong." (Tr. 423.) He indicated that the matter of medical insurance for retirees would have to be negotiated, but at one meeting stated that if the Union succeeded in obtaining a continuation of the medical retirement at negotiations he would be considered a failure and would lose his job. (Tr. 343.)[7]

Lewis stated that he was proud that there had been no layoffs at the Monroe facility in the past.[8] He explained that the Company had been able to avoid layoffs at union-free facilities, but had been forced to lay off employees at unionized facilities, because the union-free arrangements allowed the Company the flexibility necessary to keep employees busy during economic downturns. Lewis asked employees "who here would like to work 32 hours or get laid off?" (Tr. 353.) "[H]ow do you like 32 hours? We can do that." (Tr. 345.)[9]

The General Counsel alleges that after Cheryl Hoffman, who worked in the Monroe facility's scrap yard, attended one of the meetings, Hoffman's supervisor, Toni Hallam, conducted a coercive interrogation of Hoffman. No one testified regarding this subject other than Hoffman and Hallam. Hoffman testified that she asked Lewis questions during the meeting, and that Hallam approached her about 30 minutes after the meeting ended. In Hoffman's account, Hallam said that Lewis told her that Hoffman had a lot of "issues." According to Hoffman, Hallam proceeded to: state that she assumed Hoffman was a "yes" vote; demand to examine Hoffman's hard hat for union stickers (there were none); and tell Hoffman to "think long and hard before [she] voted." In contrast, Hallam testified that Lewis has never come to talk to her about anything Hoffman said, and that she had never told Hoffman that Lewis had talked about her. Hallam testified that she did not say that she assumed Hoffman was a "yes" vote, did not look at Hoffman's hard hat to see if there were union stickers on it, and did not question Hallam about her union sympathies or discuss the Union with her. As discussed above, I did not find Hoffman a particularly reliable witness based on her demeanor and her testimony, which was in some respects contradicted by the documentary evidence. Her account of the conversation was uncorroborated by any evidence that she discussed the interrogation with others or took any action based on it at the time. Moreover, I find her account somewhat implausible. Mike Carmody, Dominick Castiglione, Willie Hall, and Gregory Kirk all asked Lewis questions during his presentations, but, while all of them were called as witnesses by the General Counsel, none reported being harassed, interrogated, or even approached by the Respondent about those questions. I see no reason why the Respondent's antiunion response to employees who asked questions at the meetings would be reserved for Hoffman. Similarly, no other witness reported that Hallam engaged in antiunion behavior of any kind. It is, moreover, difficult to understand why Hallam would demand to see Hoffman's hard hat given that she would undoubtedly have had the opportunity to view it when Hoffman was working. Even the timing alleged by Hoffman is improbable. She stated that Hallam approached her about 30 minutes after the meeting. That would mean that, within about 30 minutes after concluding the meeting, Lewis determined who Hoffman's supervisor was, located Hallam (who was not present at the meeting Hoffman attended), and discussed Hoffman's behavior with Hallam, who decided to talk to Hoffman and then located her in order to do so. Hallam's testimony denying the interrogation was not shown to be inconsistent or contrary to other credible evidence. Although Hallam appeared somewhat evasive during cross-examination,[10] I conclude that Hallam's denials regarding the alleged interrogation were at least as credible as Hoffman's allegations. I find that the General Counsel has failed to establish that the alleged unlawful interrogation took place.

D. Reductions in Hours and Work force Subsequent to Union Election

In October 2000, shortly after the union election, the Respondent curtailed production at the Monroe facility. Whereas the facility had previously operated based on a schedule of 21 "turns"—i.e., 21 shifts per week—it reduced this to a schedule of 15 turns. This essentially cut its operations from 7 days a week, three shifts a day, to 5 days a week, three shifts a day. To operate on a 21-turn schedule the Respondent required four crews. The 15-turn schedule only required three crews, but

[7] Hoffman testified that at the meeting she attended Lewis stated that the issue of medical insurance for retirees "would not be negotiable." Tr. 369. This account was contradicted by Dean. Tr. 714. For the reasons discussed above, I found Hoffman to be an unreliable witness, and a less reliable one than Dean. Based on the totality of the evidence, I do not credit her uncorroborated testimony that Lewis explicitly stated that the Respondent would not negotiate on the issue of medical insurance for retirees.

[8] Contrary to Lewis' statement, the Respondent had laid off employees at the Monroe facility in the past, and this was brought to Lewis' attention during at least one of the meetings.

[9] In its brief, the Respondent claims that the General Counsel offered no direct evidence that Lewis threatened employees with reduced hours or a layoff, but rather relied entirely on the cross-examination of Jonasen. R. Br. 10. However, the record shows that the General Counsel introduced the direct testimony of both Mike Carmody and Willie R. Hall regarding these alleged threats. Tr. 345, 353. This is not the only instance where the Respondent's brief misstates the record to its advantage. For example, the Respondent states that the General Counsel is asking that I find that Lewis said that the Respondent would not bargain about the stock plan and medical insurance for retirees based on "no evidence" but only the "vague testimony of Castiglione." R. Br. 5. However, the Record shows that at least two witnesses other than Castiglione gave testimony to support the allegation that Lewis said the Respondent would not bargain about the stock plan or medical retirement for retirees. See Tr. 342–343, 368–369. I assume these misstatements were the result of oversight. Regardless of the cause of the misstatements, they create unnecessary confusion and do a disservice to the adjudicative process.

[10] For example, on the subject of whether she told employees in the scrap yard that their jobs were secure despite the new scrap handling system. Tr. 983–984.

after switching to a 15-turn schedule the Respondent initially retained the fourth crew to perform "utility" work such as housekeeping, painting, and filling in for absent employees. Before reducing the production schedule to 15 turns, the Respondent did not give the Union notice or an opportunity to bargain over the change. The Respondent had reduced the number of turns before in 1986.

On October 17, 2000, the Respondent posted a memorandum informing employees that as of October 23 it would reduce their work schedule from 40 hours per week to 32 hours per week. A similar reduction in hours had been implemented in response to financial difficulties in 1985 or 1986. Prior to announcing the 32-hour schedule to employees, the Respondent did not notify the Union or give it a chance to bargain. However, in a letter dated October 18, 2000, the Respondent informed the Union of its intention. On October 18, the Union filed an unfair labor practice charge with the Board regarding the 32-hour schedule. After the charge was filed, the Respondent postponed implementation of the 32-hour schedule. The first of a series of meetings regarding the 32-hour schedule took place on October 26, 2000. Attending for the Respondent were Mark Kruger (an attorney with Cargill acting on behalf of the Respondent), Todd Dean (human resources manager for the Monroe facility), and Jodi Klecker (human resources representative). Attending for the Union were Gregory Drudi (a union servicing representative assigned to the Respondent) and David Drouillard (president of the local). At this meeting, the Respondent, inter alia, informed the Union that the 32-hour workweek had not been implemented.

A second meeting regarding the reduction in hours was held on November 1, 2000. Present at the meeting on behalf of the Respondent were Kruger, Dean, and Roper. Attending for the Union were Drudi, Drouillard, Dominick Castiglione, and Kim Geronim. Castiglione was a receiver attendant in the Respondent's purchasing department who, on October 29, had been elected plant chairperson for the Union. Geronim was with the Union's research department and apparently attended for purposes of evaluating the Respondent's claims about its financial condition. Roper started the meeting by making a presentation regarding the state of the Respondent's business. He distributed a packet of materials that indicated, inter alia, that future orders already placed with the Monroe facility were "extremely low" and "a cause for great concern." (Tr. 580.) The materials stated that "prices are falling as our competitors struggle for volume. RTI and CSC are effectively bankrupt along with Qualitech and therefore they need cash." (R. Exh. 18.) Bookings for new orders were described as "looking bleek [sic]." Id. Drudi responded to Roper's representations about the state of the Monroe facility's business by suggesting that the Respondent's desire to reduce the work hours of employees was linked to the successful union organizing drive. Castiglione questioned why the Respondent was reacting to the current downturn by cutting work hours, whereas in the past it had first taken other cost reducing measures. Roper responded that the Respondent was, in fact, taking other steps to cut spending in an effort to avoid reducing employees' work hours. Dean commented that other facilities operated by the Respondent might also be having labor reductions in the near future due to the downturn in the steel industry. The parties discussed ways of implementing the 32-hour schedule and also alternatives including voluntary layoffs, rolling layoffs, and shutting down the facility for 1 or 2 weeks at the end of the year. Dean stated that the Respondent had selected the 32-hour schedule because that option would permit the facility to quickly respond to changes in business conditions.

The same participants, with the exception of Geronim, participated in a third meeting on the same subject 7 days later on November 8. Drudi expressed concern about the possibility that bargaining unit employees were being asked to agree to reduced hours, while management was outsourcing some of the work those employees had been doing. He asked whether "there was any work leaving or being outsourced from Monroe"? Roper responded that the Monroe facility was not contracting out any more work than it usually did. According to Drudi, the parties "negotiated back and forth," (Tr. 38), and these efforts resulted in an agreement regarding the 32-hour work schedule. Under this agreement, the Union accepted the reduced work schedule, and the Respondent agreed to delay implementation of that schedule for several weeks and to pay employees based on a 40-hour workweek for vacation taken while the 32-hour schedule was in effect.[11] The Union withdrew the unfair labor practice charge it had filed over the 32-hour schedule. On November 26, 2000, the Respondent implemented the 32-hour schedule. The Union's written communication announcing the agreement to its members stated that "research was conducted regarding the steel industry," and that the Respondent had provided "comprehensive data surrounding the current business conditions which included shipments, net income, projected cycle forecasts, current and projected production schedules, booking reports, inventory and order backlogs, and general business conditions." (GC Exh. 10.)

On December 6, 2000, the Respondent met with the Union and announced that it planned to layoff employees. Attending the meeting on behalf of the Respondent were Kruger, Dean, Klecker, and Roper. Present for the Union were Drudi, Drouillard, and the union bargaining committee—Castiglione, John Carmody, Gregory Kirk, Christopher Mozingo, and Gary (Jumbo) Smith. Roper stated that the facility's business had deteriorated further since the last meeting. Smith's notes of the meeting show that Roper said the Company might be in the "red" for December. (R. Exh. 41 at p. 1.) This was the first time the Respondent informed the Union that it intended to lay off employees, but Dean had known since at least October 9, 2000, that Lewis was ordering the Monroe facility to reduce its

[11] Drudi testified that the agreement was conditioned on the Respondent's commitment that no work was leaving the Monroe facility, (Tr. 38), a claim that is denied by Kruger, the only official present for the Respondent at the time the agreement was reached, Tr. 1004–1005. I find Kruger's testimony more credible than Drudi's on this subject based on the available documentary evidence. Neither the written description of the agreement that the Union circulated to its members, GC Exh. 10, nor the Union's letter to the Board withdrawing the charge and outlining the agreement's terms, GC Exh. 11, makes any mention of the Respondent having agreed not to outsource any work. In addition, Drudi's own notes regarding the agreement do not mention that it was conditioned on the Respondent not outsourcing work. Tr. 130.

workforce. The December 6 meeting focused on the mechanics of the layoff, rather than on whether or not the layoff would occur. Kruger stated that the Respondent was pressed for time because "[b]usiness was really going south in a hurry," (Tr. 1010), and intended to use the preexisting layoff procedures in the employee handbook (the handbook) to implement the layoff. Under those procedures, employees would be selected for layoff based on their sequential seniority—i.e., the date those employees started in the particular promotional series of jobs in which they were working.[12] Drudi confirmed with Kruger that under that policy some employees with a great deal of plantwide seniority could be laid off, while employees who had been at the Monroe facility a shorter time could be retained. Drudi took the position that layoff based on sequential seniority was unfair, and that the Union wanted to negotiate a new layoff procedure that would base layoff decisions on employees' overall seniority at the Monroe facility. Drudi suggested that the parties negotiate a layoff policy that would be, or looked like it could be, part of the labor contract.[13] He stated that the Union was willing to accept the layoff policy in place at the Respondent's facility in St. Paul, Minnesota. Kruger stated that the Respondent's intent was to use the policy in the handbook, but that it would "look at other options" expressed by the Union committee and resolve how best to implement the layoff. (R. Exh. 41, pp. 8–9; Tr. 940–947.) He stated that representatives of the Respondent would meet with representatives of the Union in order to help the Company "tweak" the policy in the manual, but was not willing to negotiate what language would be included in the contract in advance of the upcoming contract negotiation sessions.[14] Drudi rejected this invitation, and took the position that the Union wanted to negotiate a new policy based on plantwide seniority, but would not meet with the Respondent to "tweak" the existing policy. The Union, he stated, had not had a voice in the creation of the handbook layoff policy based on sequential seniority and did not want to take any of the "heat" for layoff decisions based on that policy. He told Kruger that the layoff was the Respondent's "baby" and the Union wanted nothing to do with it.

One or more of the union representatives present at the meeting suggested that some jobs could be saved by having bargaining unit employees do certain work—e.g., cutting scrap, cleaning rake beds, housekeeping—that was being performed by outside contractors. Kruger responded that the Respondent was willing to consider transferring work from contractors to its own employees.

After the December 6 meeting, Kruger and Drudi exchanged letters in which each blamed the other for refusing to bargain over the layoff procedures. (GC Exhs. 14 and 15.) Kruger's letter, dated December 8, stated that given the Union's refusal to bargain, the Respondent would follow the layoff procedures in the handbook. Drudi's December 19 response to Kruger, stated that the Union was again requesting to bargain regarding "the structure of the layoff and the procedures to be followed."

On about December 11, 2000, Dean gave Castiglione a version of the "layoff packet" that the Respondent intended to distribute to inform employees of their selection for layoff and of the applicable procedures. Castiglione reviewed the materials, and told Dean that an aspect of the recall procedure was contrary to the procedures described in the handbook. Dean considered the objection and changed the offending provision after concluding that Castiglione was correct. Castiglione was notified of the change by letter. Castiglione subsequently told Dean that he wanted to negotiate the matter, but Dean stated that he had already changed the packet in response to Castiglione's concern. Shortly after December 12, 2000, the Respondent distributed the layoff packet, as modified based on Castiglione's concern, to affected employees.

At trial, Castiglione described six other ways in which he claimed the layoff procedures in the packet were contrary to the handbook. (Tr. 309–314, 318–319.) Dean testified regarding each of the instances raised by Castiglione, and contended that in none of the cases were the procedures in the packet inconsistent with the handbook. (Tr. 768–783.) My review of the points raised by Castiglione revealed that the inconsistencies are quite technical and involve disputes over how matters were handled in an earlier layoff, and hairsplitting about the proper interpretation of language in the layoff packet and the handbook, as well as of the handbook's silence on certain matters. Dean testified credibly that the procedures in the layoff packet regarding reclassification of employees, bonuses, and insurance coverage, were consistent with the way a prior layoff had been conducted. Other challenged provisions in the layoff packet did not contradict the handbook in any way, but rather filled minor interstices in the handbook's procedures. For example, the handbook did not state how much time recalled employees

[12] A sequence is a series of jobs within a department. Employees enter the sequence at the "bottom" and as they gain experience they can move into more highly skilled and paid positions within the same sequence.

[13] In its brief the Respondent contends that Drudi refused to negotiate about the procedures to be used to implement the January layoff unless those negotiations were for a new procedure that would be part of the labor contract. The Respondent contends that by trying to force it to negotiate the contract on a "piecemeal" basis the Union was imposing an improper condition on negotiations over the January layoff. (R. Br. 70–71.) However, even under Kruger's account, Drudi expressed a willingness to negotiate language that "look[ed] like" contract language, and, I find, was not insisting that the language actually had to be included in the labor contract. (Tr. 1012.)

[14] Drudi claims that at the meeting Kruger announced: "It's our intention to follow the handbook. We're not interested in negotiating. . . . What [we] will offer the Union is afford you the opportunity to create a little subcommittee to sit down with the Company and ensure that the handbook was being followed." Tr. 51–52. This account is contradicted by the testimony of Kruger and other management witnesses and I do not credit it. Drudi was an evasive and unnecessarily contentious witness during cross-examination by the Respondent's attorney and I believe he was biased and unreliable regarding most disputed matters. As discussed earlier, Drudi's assertion that the Respondent's agreement not to outsource work was a condition of the agreement reached regarding the 32-hour schedule was contrary to the documentary evidence and unworthy of credence. See supra, fn.11. His account of Kruger's blanket refusal to negotiate does not ring true, and is belied by the meeting notes of Smith, a union committee member, which report that Kruger said the Respondent's "[i]ntent is to go by the handbook, but to look at other options expressed by [the union] committee," R. Exh. 41 at p. 9, and "resolve" how "best . . . to do it." Id. at p. 8.

would have to respond to the recall offer and the layoff packet defined a time period. At any rate, no bargaining unit members were identified who were shown to have been impacted in a significant way by a difference between the procedures in the layoff packet and those in the handbook. The inconsistencies identified by Castiglione at trial, to the extent that any of them are inconsistencies at all and were not remedied before the layoff packet was distributed to employees, are insubstantial.

On January 4, 2001, 3 days before the layoff was scheduled to be implemented, a meeting was held between the Respondent and the Union. Attendees included Kruger, Drudi, and the entire union bargaining committee. Al Sufka, the Cargill attorney who would be representing the Respondent in the negotiations for the labor contract was also present and was introduced to the union officials for the first time. Roper discussed the state of the Respondent's business, which he said continued to be bleak. Drudi asked if the layoff had been implemented yet, and when he was told that it had not been, he said he wanted to discuss the seniority issues relating to the layoff. Kruger took the position that the Union had been given an opportunity to discuss the procedures in December and had not been willing to do so, but that the Respondent was still willing to meet. The parties discussed recalling employees based on plant-wide seniority in order to let some of the long-time employees who had been laid off return sooner. The Respondent indicated that, in its view, such an effort would make sense only if the layoff turned out to be lengthy since such a recall would disrupt job sequences and require additional training. The parties agreed to consider recalling senior employees at a future meeting.

The layoff took effect on January 7, 2001, and approximately 66 employees were selected for it. Once the layoff was implemented, most, if not all, of the remaining employees, returned to a 40-hour a week schedule.

E. Work Performed by Outside Contractors and at Other Facilities after the Union Election

Testimony and other evidence was presented at trial regarding work that the Respondent could have assigned to its own employees, but which the Respondent instead paid outside contractors to perform. One of these tasks was referred to as the "stacking of squares." Squares are bars of steel that are fastened into bundles as part of the production process. The configuration of these bundles is unacceptable to one of the Respondent's clients. "Stacking of squares" refers to the process of opening up those bundles and reconfiguring the squares into a new bundle built according to the specifications of that client. Some of the squares are stacked by employees of the Respondent, usually by the six inspectors in the Respondent's shipping department, and some of the squares are stacked by outside contractors. Square stacking represents roughly 25 percent of all the work done by the shipping department inspectors. The Respondent began stacking squares in July 1998, and has done so for each "rolling," i.e., production cycle, since then. The percentage of the square stacking work done by outside contractors, rather than by the six inspectors, has varied since July 1998. Initially the Respondent's own employees stacked all the squares, but beginning in April 1999 a significant percentage was usually sent to outside contractors. For the five rolling that occurred between April 1999 and June 2000 the percentage of stacking done by outside contractors ranged from 17 to 40 percent with the exception of one unusually small-scale rolling in November 1999, which was stacked entirely by the Respondent's employees. The first rolling after the union election was in November 2000, and those squares were stacked in November and December. In that instance the Respondent had 60.6 percent of the squares stacked by outside contractors. This was the first and only time that the Respondent's employees did not stack a majority of the squares.

Officials of the Respondent have offered at least two explanations for the increase in the percentage of squares being sent out for stacking. Roper, the works manager, testified that he was told that the shipping department sent out a greater proportion of squares for stacking in November in order to reduce overtime and make sure that the product was ready for shipping.[15] On the other hand, Harry Collum, an inspector in the shipping department, testified credibly that he was told by a supervisor involved with the assignment of the square stacking work that the percentage of squares sent out had been increased due to the Respondent's concerns about safety hazards associated with opening the bundles of squares. However, Collum testified that the Respondent's employees routinely opened bundles of squares for reasons unrelated to the square stacking work.

Another type of work that the Respondent has used both its own employees and outside contractors to perform is the removal of steel "scale" that accumulates under the "rake bed" where steel bars are cooled in the caster department after production. Prior to the beginning of 2001, employees in the Respondent's caster department would clean under the rake bed once a week, a job that required 8 to 10 hours to complete. The employees collected the scale using shovels and wheelbarrows and then dumped the scale into a hopper. Since April 1999, the Respondent has had a contract with Hydro Technologies Incorporated (Hydro Tech) under which Hydro Tech performs cleaning and disposal work. The contemporaneous "daily reports of labor" that Hydro Tech uses to bill the Respondent show that Hydro Tech employees cleaned under the rake bed in the caster department on February 2 and 9, 2000, and August 17, 2000. Hydro Tech's president, Morris Partridge, who is present at the Monroe facility most workdays, testified that his company has cleaned under the caster department rake bed on more than those three occasions and does so "fairly often," but he was unable to be more specific, and no daily reports of labor were offered for other days. When Hydro Tech employees cleaned under the rake bed they used a vacuum truck that belonged to Hydro Tech, in addition to shovels and wheelbarrows.

One caster department employee, Gerald Duvall, testified that he did not observe the Hydro Tech employees cleaning the

[15] Roper testified that after discovering the November increase in the percentage of squares being sent to outside contractors for stacking, he directed the responsible official in the shipping department never to allow the percentage of work sent out of the plant to exceed the levels from before the union campaign and election. Roper also informed the Union that he had given this directive. As of the time of trial, the percentage of squares being sent to outside contractors for stacking had not exceeded the preelection levels again.

caster department rake bed until January 2001 and that from then, until mid-May 2001, he was not called upon to clean the rake bed. The suggestion is that the Respondent reassigned the work from its own caster department employees to the employees of the outside contractor. I do not believe that Duvall's testimony establishes that this is the case. The evidence did not show that Duvall had the opportunity to observe who cleaned the rake bed on shifts other than his own. Indeed, although Hydro Tech employees had been cleaning under the caster department rake bed at least occasionally since early in the year 2000, Duvall apparently did not observe them doing so until January 2001. He stated that he did not clean under the rake bed from January until May 2001, but his testimony does not establish that the Respondent's employees were not doing this work on shifts other than his own. In other words, Duvall's testimony does not establish that the Hydro Tech employees began cleaning the rake bed in the caster department more frequently in 2001, or that the Respondent's employees, with the exception of Duvall, were doing so less frequently. The record does not include "daily reports of labor" or other documentary evidence showing that Hydro Tech employees were cleaning the caster department rake bed any more often in 2001 than they had before the union election. I find that the record does not provide a sufficient basis in fact to support the allegation that the Respondent increased the outsourcing of rake bed cleaning following the union election.

Hydro Tech employees also empty the dumpsters outside the storeroom twice a month. The Respondent's employees in the storeroom are responsible for gathering materials outside the storeroom that need to be placed in dumpsters. During recent periods when the storeroom has been short of personnel, employees there have had little time to devote to cleaning work around the storeroom. Castiglione, who is a storeroom department employee in addition to being plant chairperson for the Union, testified that he did not notice Hydro Tech employees doing clean-up work around the outside of the storeroom until after the Respondent laid off a number of its own employees on January 7, 2001. However, the fact that Castiglione did not notice Hydro Tech employees doing this work prior to that time does not establish that such activity was not taking place. The evidence does not establish that Castiglione had the opportunity to observe every activity, or even most activities, that took place around the outside of the storeroom during his shift, let alone during other shifts. Given that the Hydro Tech employees emptied the dumpsters only twice a month, it would not be at all surprising that Castiglione would fail to notice such activity until motivated by the layoff to become particularly vigilant. Similarly, Kirk, a member of the union bargaining committee, stated that he first noticed employees of Hydro Tech performing clean-up work around the shipping department approximately 2–3 weeks after the January 7 layoff. Here too, the record does not persuade me that Kirk had the opportunity or the motivation to notice all, or most, such activity by Hydro Tech employees prior to the January 7 layoff. No "daily reports of labor" or other documents were introduced to show a change in the work being performed by Hydro Tech employees. Based on the evidence it is certainly *possible* that after the union election the Respondent began to use Hydro Tech employees to perform general labor housekeeping work previously performed by the Respondent's own employees. However, the evidence presented does not establish that the Respondent *did* do that. I find that the record does not provide a sufficient basis in fact for the allegations based on Hydro Tech's performance of general labor and housekeeping work.

F. Elimination of Positions in the Scrap Yard

Prior to August 2000, the Respondent had moved the steel in its scrap yard using two cranes and a locomotive that pulled freight cars along tracks. On each of the four shifts there were three employees working in the yard—one to operate the locomotive and two to operate the yard cranes. In a May 1999 memorandum, the Respondent informed employees that it was examining new systems for its scrap yard operation, and that its objectives included eliminating the high-maintenance scrap crane, reducing the number of times the scrap had to be handled, and reducing manpower by four persons. The memorandum stated, however, that the consideration of new scrap handling systems was only in the "feasibility stage" and that the Respondent would "publish and communicate the results of this review as they develop, well before any decisions would be made which affected the total number of individuals in the Melt Shop."

In April 2000, Roper ordered two front-end loaders for a new scrap handling system that would replace the yard crane/locomotive system. The first of the front-end loaders was delivered in June 2000 and the second in either July or August 2000. Using the new system, the Respondent was able to function with only two persons per shift at the scrap yard since there were only two front-end loaders and each required one person to operate it.[16] The front-end loader system began operating in August 2000, but the third person was initially retained on three of the shifts to help relocate scrap within the yard to suit the new system. Previously, when one of the scrap yard employees transferred to another assignment in late 1999 or early 2000, the Respondent had not replaced him, which meant that there were only two employees on one of the four shifts.

At some point during the scrap yard transition period Toni Hallam, who was then the supervisor with authority over the scrap yard, spoke with one or more of the scrap yard workers regarding rumors that their positions in the yard were not secure because of the change to the new scrap handling system. Hallam stated that all they had to go on was past precedent and that past precedent was that the Respondent would only eliminate jobs through attrition. Subsequently, in October, Hallam was informed by Barbara Nocella, the superintendent of the Monroe facility's melt shop, that three positions were going to be eliminated in the scrap yard. On October 18, 2000, Nocella and Hallam met with the three yard employees with the least sequential seniority—Hoffman, Troy Daniels, and Scott Lambrix—and informed them that they were being displaced from the yard. Nocella gave each a written "notification of displacement" and explained that the action was the result of the

[16] In addition to the front-end loaders, there is also a small mobile crane that is used to pick up scrap that has fallen on the scrap yard roadways, but that work takes only 15–30 minutes per shift.

downturn in the Respondent's business and the new, more efficient, scrap handling system. Hoffman said "I thought you said our jobs were secure," and Hallam responded that "things have changed." Nocella told the three displaced employees that they would be in the "labor pool," which meant they would be assigned wherever they were needed within the Monroe facility.[17] Prior to implementing the changes discussed at the meeting, the Respondent did not give the Union notice or an opportunity to bargain.

G. No Wage Increase Granted in 2001

In most years, employees at the Monroe facility received a wage increase at the beginning of the calendar year. However, the Respondent sometimes refrained from giving wage increases based on market conditions. For example, no wage increases were given in 1983, 1984, 1986, 1987, 1988, and 1998.[18] In the year 2001, the first year after the successful union drive, the Respondent did not grant its employees a wage increase.

When Todd Dean was asked why the Respondent did not provide a wage increase to employees in 2001, his first response was "[i]t was my understanding and the Company's understanding at the time nothing changes including current wages and benefits." (Tr. 812.) In the context of the record as a whole, I find that Dean was referring to advice management gave to officials at the Monroe facility that after the union election "whatever rules, policies, procedures, that we had undertaken in the past, dealing with the workforce, supervision and management of the work force, those were where we were limited to in the future, until we moved forward with this [collective bargaining] process." (Tr. 568.) When the Respondent's counsel pressed Dean for "all" the reasons why a wage increase was not given in 2001, Dean gave other explanations, including poor business conditions and the fact that employees at the Monroe facility were already paid as well as employees at its biggest competitor and the Respondent's other facilities. Dean stated that employees at some of the Respondent's other facilities did not receive a wage increase in 2001.[19]

H. Meeting Between Lafayette and Castiglione

On January 17, 2001, an incident occurred between Castiglione and a storeroom coworker named Joyce Collins. Apparently Castiglione, whose duties including picking up the Respondent's mail from the post office, had read and photocopied a "controlled" document that was addressed to Collins. The document described certain quality standards and was being recalled because it was obsolete. Castiglione brought a copy of the document to Collins and told her that she had to inform him of any changes in operating procedures. She responded that it was not a change, that Castiglione should not have looked at mail addressed to her, and that he should not have copied the document because it was "controlled." The exchange became heated, and afterwards Collins complained about Castiglione's behavior to Kathy Lafayette, the Respondent's purchasing manager and the official who supervised both Collins and Castiglione.

Later that day, Lafayette called Castiglione to a meeting in the "front office." Although other management officials were initially present, they exited shortly after Castiglione arrived, and the meeting proceeded with only Lafayette and Castiglione present. Lafayette told Castiglione that that he had been "out of line" making a copy of the controlled document and in his actions towards Collins. She raised the subject of Castiglione's new position as plant chairperson for the Union and stated that she could see he was under a lot of stress and knew that a lot of people were now coming to him with their problems and looking to him as a leader. She compared this to the stress she herself had felt upon becoming a supervisor. Lafayette stated that she had noticed people coming in to talk to Castiglione and although she "didn't care what they were talking about" she knew that this was "all part of his new position."[20] Castiglione asked Lafayette, "are you trying to tell me I can't talk about the union?," to which Lafayette responded, "[t]hat's not what I'm trying to say." In fact, Castiglione testified that management had encouraged employees to discuss workplace issues with him. Lafayette also brought up Castiglione's "attitude," which she characterized as having become "cocky" and confrontational. Castiglione responded that he saw himself as a "marked man" who had to "watch his back" because of his position with the Union. After the meeting, Castiglione told Dean that it had

[17] Hallam and Hoffman subsequently had a meeting in Hallam's office regarding the December 2000 performance appraisal that Hallam completed for Hoffman. During the meeting Hoffman asked why she was not working in the scrap yard anymore. Hallam testified that she told Hoffman that the Respondent's business was slow and that changes in the scrap handling system meant that fewer employees were needed in the yard. However, Hoffman testified that Hallam said things have changed "since *September 21*," i.e., since the date of the union election. Hallam testified that she did not recall saying that and did not recall Hoffman bringing up the date. For reasons discussed above, Hoffman was a somewhat unreliable witness and I do not credit her testimony that Hallam made reference to September 21 to explain Hoffman's displacement from the yard. When Hallam was confronted with her previous reassuring statements regarding yard employees' job security, she responded, "things have changed," but I credit her testimony that she made no reference to September 21 and that she meant that "manufacturing had slowed down, our economy, our orders, our backlog was severely decreased and that that dictated doing what we were going to do." Tr. 978–979. This is consistent with the available evidence regarding the state of the Respondent's business.

[18] In 1998, the Respondent gave employees at the Monroe facility a one-time bonus, but not a wage increase. I do not consider a bonus, which does not affect compensation on a continuing basis, to be the same as a wage increase.

[19] Hoffman testified that Roper held a meeting with a " bunch" of hourly employees four or five months before the union vote, at which Roper stated that employees would receive a 3-percent wage increase in 2001. Roper denies making such an announcement in 2000 regarding a wage increase in 2001, although he remembers making an announcement in December 1999 about an increase in 2000. No other witness corroborated Hoffman's testimony that Roper made such a statement in 2000, and Hoffman was unable to name a single one of the "bunch" of other employees who she says were present. Tr. 379–380, 391. I do not credit Hoffman's testimony that Roper told employees that they would receive a wage increase in 2001.

[20] Lafayette's office was in the same storeroom where Castiglione worked, but she did not have a view of his workstation from her office. She could, however, observe his activities when she walked through the storeroom.

gone well and cleared the air.[21] Lafayette believed the meeting ended "well." The meeting did not result in any discipline for Castiglione and nothing was put in his personnel file about the incident.

I. Transfer of Production from the Monroe Facility to the Respondent's St. Paul Facility

At a meeting between the Union and the Respondent on February 13, 2001, Roper made representations about the negative effect that reductions in the "tonnage" being produced at the Monroe facility were having on the facility's fixed and/or excess costs. Christopher Mozingo, a member of the bargaining committee, asked Roper why, if that was the case, were "some of our tons" being "sent" to the Respondent's St. Paul, Minnesota, facility. Mozingo had seen an electronic mail message that was sent to Roper and others by the Respondent's sales department and which stated that certain steel that the Monroe facility had been producing or was slated to produce would instead be produced by the St. Paul facility. In response to Mozingo's question, Roper stated that the Respondent was no longer interested in having the Monroe facility produce the lower grades of steel that Mozingo was referring to, and wanted to concentrate instead on the higher grades of steel products.

At trial, Roper discussed a report, apparently prepared for trial, which he said showed that no production had been shifted from the Monroe facility to the St. Paul facility. (R. Exh. 1.) Roper conceded that production had increased at the St. Paul facility during the relevant timeframe, but stated that the production report shows that no decrease in production of a particular type of steel at the Monroe facility was matched by an increase in production of the same type of steel at the St. Paul facility during the period from 1999 to 2001. Roper testified that as works manager he would have known about any diversion of steel production from the Monroe facility to another facility. (Tr. 666–667.) He said that he had not read anything that suggested that work was being transferred from the Monroe facility to the St. Paul facility (Tr. 653), and that he performed an investigation of the matter that yielded no evidence of such a transfer (Tr. 644–645). In apparently contradictory testimony, however, Roper stated that he *was* aware of an electronic mail from the sales department that stated work was being transferred from the Monroe to the St. Paul facility, although he said that was merely a "forecast." (Tr. 653–654.) He testified that after the preparation of the report on production he became aware that 175 tons of steel that was originally destined for production by the Monroe facility had, in fact, been transferred to the St. Paul facility in December 2000. (Tr. 665.)[22] Roper stated that he had no idea why this transfer of work occurred.

Roper's testimony on the subject of the alleged transfer of work from the Monroe facility to the St. Paul facility was almost incoherent and I found it less than fully credible. As noted above, Roper contradicted himself regarding his knowledge of a document discussing the transfer of some work, and he could offer no explanation at all for why such a transfer had occurred. The Respondent argues that the decision to transfer the work was made by the sales department in Edina, Minnesota, and that the Monroe facility was not "privy" to it, Respondent's Brief at 97, but Roper himself stated that as works manager he would have known about any diversion of steel production. (Tr. 666–667.) Moreover, his claim that he did not know about the diversion when Mozingo raised it on February 13 is suspect given that the electronic message Mozingo saw was addressed to Roper among others, and also given that Roper responded to Mozingo's query by essentially defending, rather than denying, the transfer of production of lower grade steels. I find that Roper was aware of the transfer of steel production to the St. Paul facility at the time of the February 13 meeting when Mozingo asked about it.

Although the problems with Roper's testimony about the alleged transfer of steel work raise some questions, I find no basis on the record for concluding that the transfer involved more than the 175 tons discussed above, or for rejecting the figures in the production report which indicate that 175 tons was a small fraction of the Monroe facility's output.[23] Mozingo did not testify that the electronic mail message he read indicated that a larger amount of production was being shifted and none of the parties introduced other evidence of a larger transfer.

J. Information Requests

The Union has requested various types of information from the Respondent since becoming the collective-bargaining representative of employees at the Monroe facility. The Union made its first, and most extensive, request in a letter dated October 24, 2000. The request listed 13 items, and the Union states that the Respondent did not provide adequate information regarding items 4 through 7, and 13. Those five items are as follows:

> (4) Income statements for the last three (3) full years;
>
> (5) General and administrative expenses, including details on management salaries and benefits;

[21] When Castiglione was asked at trial whether he told Dean the meeting with Lafayette "went well" and "cleared the air" regarding some issues, Castiglione responded, "I may have said that along with some additional things which I know I said additional." Tr. 297. I believe that this was a somewhat evasive response, but one that effectively conceded that Castiglione told Dean the meeting had gone well and had cleared the air regarding some issues.

[22] Roper testified that at the February 13, 2001 meeting with the Union he responded to a question by stating that no steel production was being transferred to the St. Paul facility from the Monroe facility, but that his answer had since changed because he discovered that, in December, 175 tons of production had been transferred to St. Paul. Tr. 642–643, 665. Roper did not explicitly state the year that the transfer took place. However, considering his reference to "December" in context of his other testimony, I conclude that he was referring to December 2000.

[23] For example, the Respondent's Report indicates that in December 2000 (the lowest production month from June 1999 to May 2001and the month when the 175 tons of production were transferred) the Monroe facility produced approximately 220 "heats" of 122.97 tons each, for total production of 27,053 tons. R. Exh. 1, chart titled "Total Heats Produced by Month at [Monroe] Michigan for Fiscal Years 99/00 and 00/01." In January 2000, the Respondent produced approximately 420 "heats" of 122.97 tons each, for a total of 51,647 tons. Id. In either case, the 175-ton transfer in December 2000 would constitute less than 1 percent of a single month's production.

(6) Operating plans, budgets, forecasts or other documents dealing with projected costs and operating results;

(7) A list of all your competitors, including company name, address, and whether they are unionized. Also, any wage and benefit information you have on them;

(13) A detailed list of all work that is currently being subcontracted by any temporary service, and any work that may be subcontracted in the next 12 month period, including name and address of whom the work is contracted to.

(GC Exh. 7.)

At the meeting on November 1, 2000, the Respondent provided the Union with a packet of materials that included manufacturing and financial data for the Respondent for years 1999 and 2000. In a statement to its members later that month, the Union stated that the Respondent had provided "comprehensive data surrounding the current business conditions which included shipments, net income, projected cycle forecasts, current and projected production schedules, booking reports, inventory and order backlogs, and general business conditions." (GC Exh. 10.)

At the meeting on December 6, 2000, the Respondent informed the Union that it would soon be providing the Union with additional information in response to the October 24 information request. During that meeting the Union verbally made a new request for information, this time for a history of the Respondent's use of outside contractors to stack squares. Roper stated that he would find the information and provide it to the Union.

On December 23, the Company gave Castiglione a packet of materials in response to the Union's October 24 information request. Dean was the management official largely responsible for preparing this packet. It is not disputed that these materials responded to all of the October 24 information request with the exception of items 4 through 7 and 13, which are set forth above. (Tr. 275.) Regarding the disputed items, the record is generally unclear about precisely what was or was not provided. There are, however, a few points that can be gleaned from the record with clarity. In response to item 7, which requested a list of the Respondent's competitors and information that the Respondent had regarding the wages paid by those competitors, the Company provided only a photocopy of the commercially published "2000 Directory of Iron and Steel Plants." (R. Exh. 5.) Dean conceded that not all of the over 100 facilities listed in the directory were competitors of the Respondent's, and that the directory did not identify which ones were competitors. According to James Jonasen, general manager of the Monroe facility during the relevant period, the Respondent had four primary competitors—Timken Steel, Max Steel, Republic Technology, Inland Steel—but these companies were not identified to the Union in response to the information request. Dean had information about the wages being paid by Max Steel,[24] but did not provide that information to the Union.

The record shows that in response to item 13, which requested a list of all work being performed by subcontractors, the Respondent provided a list that stated the name, address, and phone number of each contractor used by the Respondent and described the contractor's "business type"—e.g., "access control & security TV sys," "air pollution measurement," and "vibration analysis." (R. Exh. 11.) Another instance where the record is clear is with respect to the Union's request, in item 5, that the Respondent provide the Union with details about management salaries and benefits. The Respondent refused to provide that information, taking the position that it was "not relevant to the Union's bargaining obligation in this negotiation." (GC Exh. 17.) Regarding, item 4, income statements, the Respondent states that it provided information on net income, however, the record shows that it failed to provide income statements.[25] At one point Kruger indicated that he was willing to provide "last years' income statement," but "question[ed] the relevance of three years of income statements," (GC Exh. 17); however, income statements were not subsequently produced for any year.

At the meeting on January 4, 2001, the Company responded to the Union's December 6 verbal request for information regarding stacking of squares by providing a memorandum that stated the size of each "rolling" since July 1998, and the percentage of the squares from that rolling that were stacked by outside contractors. (GC Exh. 28.) Kirk then made a further verbal request, this time seeking information about any storage or transportation costs associated with using outside contractors to stack squares. Roper responded verbally that there were no storage costs, and subsequently he provided a written response that stated shipping costs on a "cut weight per foot" basis.

A meeting between the Respondent and the Union was held on February 5, 2001. The information requests were discussed and Drudi complained that the Respondent had failed to provide adequate information in response to items 4–7 and 13 of the October 24 request. In fact, Drudi had never even reviewed the documents that the Respondent had already provided in response to those requests "as a whole," because Castiglione had retained those documents. (Tr. 148–149.) The Respondent disagreed with Drudi about what had been provided and whether it was an adequate response. Kruger asked Drudi to prepare a written statement detailing what information the Union was seeking that the Respondent had not already provided, and explaining why the Union thought the information was relevant to bargaining. Drudi did not respond to that invitation until a March 6, 2001 meeting, when he handed Kruger a document that simply restated, word-for-word, the text of items 4–7 and 13 from the October 24 request. (GC Exh. 18.) In this request Drudi did not in any way clarify or specify what infor-

[24] Dean testified that he knew Max Steel's base wage rate "in his head," because the human resources manager at Max Steel had told him the figure several months before.

[25] Dean testified that he did not know what the Union meant by an "income statement." Tr. 817. However, Kruger, who communicated with the Union on behalf of the Respondent regarding the request, apparently did know what an income statement was since he offered by letter to provide Drudi with "last years' income statement." GC Exh. 17. Likewise, Roper testified that he had seen income statements while working for the Respondent. An "income statement" is "[t]he statement of revenues expenses, gains, and losses for the period ending with net income (or loss) for the period." *Deluxe Black's Law Dictionary* (6th ed. 1990) at p. 764.

mation he felt was still outstanding from the five items in the October 24 request.

At a meeting on March 6, Drudi verbally requested information about any steel production that the Respondent was transferring from the Monroe facility to its facility in St. Paul, Minnesota. In a letter dated March 16, 2001, Drudi reiterated that request, asking for "any and all information regarding work and orders being sent, transferred to, or reassigned from the Monroe facility to the St. Paul facility." (GC Exh. 19.) In a memorandum, dated July 5, 2001, Dean responded that it would not provide information regarding "manufacturing . . . sent from the Monroe facility to any other facility" because that is "subject to the existing Amended Complaint" and "no pre-hearing discovery [is] contemplated by the rules of the National Labor Relations Board." At trial, the Respondent introduced a production report that it argues shows that no production was transferred, but Roper also testified that about 175 tons of steel originally destined for production by the Monroe facility had been transferred to the St. Paul facility. None of this information was provided to the Union in advance of trial in response to the information requests.[26]

K. The Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when David Lewis: implied to employees that choosing the Union would be futile because the Respondent would not negotiate an employee stock option plan, a medical plan for employees intending to retire, or any entitlements, and would not allow the Union to succeed; threatened employees that, if they chose the Union to be their collective-bargaining representative, bargaining would start at "zero"; and, threatened employees with reduced hours, layoff, and different and less favorable treatment, if they chose the Union. The complaint also alleges that the Respondent violated Section 8(a)(1) when Toni Hallam coercively interrogated employees and when Kathy Lafayette gave employees the impression that their union activities were under surveillance and promulgated an overly broad no-discussion rule.

The complaint further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by eliminating yard operator positions and displacing employees Cheryl Hoffman, Troy Daniels, and Scott Lambrix because employees chose the Union as their collective-bargaining representative and engaged in concerted activities, and to discourage employees from engaging in protected activities.

The complaint further alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by taking the following actions without giving the Union a meaningful opportunity to bargain: eliminating yard operator positions and displacing employees Cheryl Hoffman, Troy Daniels, and Scott Lambrix; reducing unit employees' work hours at its Monroe facility; substantially increasing the outsourcing of squares; outsourcing the cleaning of the rake bed in its caster department; transferring processing of nonshrouded steel from its Monroe facility to its St. Paul facility; using outside contractors to perform general labor and housekeeping work; failing to provide unit employees with an annual wage increase; laying off employees; and implementing a layoff procedure that differed form the one provided in the employee manual. The complaint also alleges that the Respondent refused to bargain collectively and in good faith in violation of Section 8(a)(1) and (5) by failing and refusing to supply the information requested by the Union: on October 24, 2000, in its written information request; on December 6, 2000, and January 4, 2001, regarding the stacking of steel squares; and on March 6 and 16, 2001, regarding work and orders that the Respondent reassigned from its Monroe facility to its St. Paul facility.

III. ANALYSIS

A. Alleged 8(a)(1) Violations

1. Statements by David Lewis

The General Counsel alleges that Lewis threatened employees with different, unfavorable, treatment, as well as with reduced hours, and layoff. An employer violates Section 8(a)(1) by threatening employees that it will treat employees in a less favorable manner as a consequence of their selecting a union as their bargaining representative. *Treanor Moving & Storage Co.*, 311 NLRB 371, 373–374 (1993); *Azalea Gardens Nursing Center*, 292 NLRB 683, 686 (1989); *Maxwell's Plum*, 256 NLRB 211, 215 (1981).[27] The evidence showed that Lewis[28]

[26] In a letter dated June 6, 2001, Drudi requested that Dean provide information on "[a]ny and all work that has been out contracted or subcontracted at North Star Steel, Monroe, Michigan during the year 2001." GC Exh. 20. In its brief, the General Counsel alleges that the Respondent's refusal to provide information in response to this request was a violation of the Act GC Br. at 61, however, the complaint does not allege a violation based on the June 6, 2001 information request. See (complaint pars.18–24) (second amended consolidated complaint, GC Exh. 1(w)). The issue of the June 6 information request was not briefed by either the Respondent, see R. Br. at 72–97, or the Union, see UAW's Br. at 17–24. I conclude that the question of whether the Respondent's refusal to provide information sought on June 6, 2001, was not fully litigated and reach no decision regarding it.

[27] The General Counsel also states that Lewis threatened employees that bargaining would start at "zero" if the facility became unionized. For the reasons discussed above, I found that the record fails to establish that Lewis made this statement. Therefore, the allegation that this statement violated Sec. 8(a)(1) should be dismissed.

[28] The Respondent's answer to the second amended consolidated complaint states that "[t]o the extent that a response is required" to the allegation that David Lewis was a supervisor within the meaning of Sec. 2(13) or an agent within the meaning of Sec. 2(11), "the allegations are denied." The Respondent does not press this argument in its brief. At any rate, it is clear that Lewis was acting an agent for purposes of the statements alleged to violate the Act. All of Lewis' at-issue statements were made while he was conducting meetings that the Respondent directed its employees to attend and which were held at the Respondent's facility. At those meetings Lewis told employees that he would be the Respondent's lead negotiator if the Union were selected and made various representations about how the Respondent would behave in those negotiations. These statements were made in the presence of the general manager of the Monroe facility (Jonasen) and other management officials of the Respondent, who were not shown to have questioned or contradicted Lewis' representations. In addition, Dean testified that he received direction from Lewis regarding the need to implement a layoff at the Monroe facility. Lewis was Cargill's vice president for human resources at the time he made the statements al-

told employees that the relationship between management and hourly employees at the Monroe facility was like a "marriage" and that it would be a "bad divorce" if employees allowed a "third party" to come between them. In its brief the Respondent contends that the comment comparing unionization to a "divorce" between management and employees was not made in a "threatening manner" and merely conveyed that things would be different and that unionization could not guarantee that the changes would be an improvement. (R Br. at 12.) I do not necessarily agree that an employer's statement comparing unionization to a "divorce" from its own workers is not threatening. At any rate, according to four witnesses, including management witness Dean, Lewis did not merely say that unionization would be a divorce, but that it would be a *bad* divorce. (Tr. 183, 340, 368, 711.) Based on the surrounding circumstances, I conclude that this is a threat that the Respondent would adopt a hostile posture towards its employees if they chose to bargain collectively with the Respondent. See *Mediplex of Danbury*, 314 NLRB 470, 471 (1994) (in determining whether a statement is violative of Section 8(a)(1) or protected by Section 8(c), the Board considers the totality of the relevant circumstances). After all, what distinguishes a divorce from a *bad* divorce if not the hostility of one or more of the parties? I am not persuaded otherwise by the Respondent's citation of *Ebenezer Rail Car Services, Inc.*, 333 NLRB 167 (2001), in which the owner of a company told employees that unionization made him feel "like getting a divorce or losing a child through death." See Respondent's Brief at 13. In that decision neither the Board nor the administrative law judge addressed the question of whether the reference to divorce was a violation of 8(a)(1). Moreover, the employer there did not say that unionization would be a "*bad* divorce," only that it made him feel "like getting a divorce." As previously noted, this is a significant difference. I conclude that the Respondent threatened employees with different, unfavorable, treatment, in violation of Section 8(a)(1).

Regarding the alleged threat of reduced hours and layoffs, the evidence showed that Lewis told employees that he was proud that there had been no layoffs at the Monroe facility in the past and that the reason the Respondent had been able to avoid layoffs at nonunion facilities during economic downturns while layoffs were necessary at unionized facilities was because of the flexibility allowed by the union-free arrangement. Lewis asked employees "who here would like to work 32 hours or get laid off?" "[H]ow do like 32 hours? We can do that." Statements by an employer during a union campaign that unionization will likely result in a reduction in hours, *Reeves Bros., Inc.*, 320 NLRB 1082, 1083 (1996), *Bay State Ambulance Rental*, 280 NLRB 1079, 1083–1084 (1986), and could result in layoffs, *Hertz Corp.*, 316 NLRB 672, 686 (1995), violate Section 8(a)(1). Moreover, the record shows that, contrary to Lewis' assertion, the Respondent had had at least two layoffs prior to the union drive. (Tr. 604.) Thus Lewis did not have a basis in objective fact for stating that the facility had never had a layoff in the past and that the reason was the union-free arrangement. See *Components, Inc.*, 197 NLRB 163, 164 (1972) (an employer's statement to employees predicting that adverse economic consequences will result from unionization is a violation of Section 8(a)(1) if such prediction is not carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control). I conclude that Lewis unlawfully threatened employees with reduced hours and layoffs in violation of Section 8(a)(1) of the Act.

The General Counsel also alleges that Lewis made statements to employees during the union campaign which implied that it would be futile for them to select the Union as their bargaining representative. Statements by an agent or supervisor that imply it would be futile to support the union are violative of Section 8(a)(1) of the Act. *Hertz Corp.*, 316 NLRB at 685–686. During the union campaign in this case, Lewis told employees that, if the employees unionized, he, as the lead negotiator for the Respondent, would be a "failure" if the Union obtained a contract that made unionization attractive to employees at the Respondent's union-free facilities. He explained that the Respondent had to limit what the Union obtained in order to avoid a "domino effect" on those union-free plants. At one meeting he stated that if the facility unionized he would not allow the Union to "succeed" by getting a contract that provided the same terms and conditions as the employees already had. He also discussed two existing employee benefits that were of particular interest to workers at the Monroe facility. One was the medical insurance that the Respondent provides to retired employees, but has announced an intention to discontinue. About that, Lewis told employees "if you think getting a union in here will get your medical retirement, you're wrong." The other benefit was the employee stock ownership plan. Lewis stated that if the facility became unionized the continuation of that plan would be a subject for negotiations, but that no unionized facility within Cargill had such a plan. These statements, taken together, had a clear message—i.e., that collective-bargaining would not result in the employees obtaining benefits other than what the Respondent chose to give them and that unionization would necessarily lead the Respondent to choose to give them less. I conclude that the statements by Lewis violated Section 8(a)(1) by, in effect, threatening employees that it would be futile to choose the Union to bargain collectively on their behalf.[29]

leged to violate the Act. The record suggests that Lewis had actual authority to act as the Respondent's agent for purposes of the statements he made to employees at the meetings. Even if he did not have actual authority it is clear that he had "apparent authority." Such authority exists when, as here, "'the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had the authority he purported to have.'" *Cablevision Industries*, 283 NLRB 22, 29 (1987) (quoting *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co.*, 414 F.2d 750, 756 (9th Cir. 1969)); see also *Contemporary Guidance Services*, 291 NLRB 50, 64 (1988). I conclude that Lewis was an agent of the Respondent for purposes of statements he made during the meetings with employees at the Monroe facility. Given that conclusion, it is not necessary for me to decide whether Lewis was also a supervisor within the meaning of Sec. 2(11).

[29] The Respondent argues that Lewis' remarks during the meetings indicated that he was "prepared to bargain" over the issues raised and

2. Statements by Kathy Lafayette

The General Counsel alleges that the Respondent violated Section 8(a)(1) because Lafayette gave Castiglione the impression that employees' union activities were under surveillance and promulgated an overly broad no-discussion rule. An employer violates the Act when it creates the impression among its employees that it has placed their union activity under surveillance. *Robert F. Kennedy Medical Center*, 332 NLRB1536, 1540 (2000). The employer's actions are evaluated from the perspective of the employee and are unlawful if they would reasonably cause an employee to believe that his or her activities are under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 50–51 (1999). I conclude that Lafayette's statements to Castiglione on January 17, 2001, indicating that she was aware that employees came to his workstation to talk to him because of his new position as union plant chairperson, and expressing her concern about the stress he was under, did not give Castiglione a reasonable basis for believing that his activities were under surveillance. The activities to which Lafayette referred took place in the workplace in plain view of persons in the storeroom. Lafayette's statements did not indicate to Castiglione that she was interested in, or aware of, any of the specifics of conversations employees were having with him or of the identities of those employees. Lafayette did not suggest that she was aware of any union activities that took place away from the workplace or in a private setting. The general, nonspecific, knowledge that Lafayette alluded to was not suggestive of surveillance. Such information would be apparent to anyone who, like Lafayette, worked in the same part of the facility as Castiglione and knew that Castiglione was the plant chairperson for the Union. Although Lafayette could not see Castiglione's from inside her office, she did see him without unusual effort while walking through the storeroom, of which she was the supervisor. There is no evidence to indicate that she changed any of her normal routines in the storeroom to increase her opportunity to observe Castiglione, or to create the impression of such an increase. The Act does not impose an obligation on supervisors to make efforts to avoid noticing activities by their supervisees. *Metal Industries*, 251 NLRB 1523 (1981) ("management officials may observe public union activity . . . on company premises . . . unless such officials do something out of the ordinary").

In addition, Lafayette had a legitimate reason for alluding to the stress that she believed Castiglione was under. It is undisputed that Lafayette met with Castiglione after receiving a complaint about his behavior from Collins. The record showed that Collins' complaints were not unfounded—Castiglione had opened mail addressed to Collins, had improperly photocopied a "controlled" document he found in that mail, and then had confronted Collins with the document. Such behavior by a long-time employee would be a matter of concern for Lafayette as the supervisor of both Castiglione and Collins, and I credit Lafayette's testimony that she suspected that Castiglione was having trouble with stress. A reasonable employee would have seen Lafayette's comments comparing Castiglione's stress to her own as an effort to counsel him, not as an indication of surveillance. Indeed Castiglione himself told Dean that he thought the meeting with Lafayette had "gone well" and "had cleared the air of some issues."

For the reasons discussed above, I conclude that the allegation that the Respondent unlawfully created the impression of surveillance in violation of Section 8(a)(1) should be dismissed.

The General Counsel also alleges that during the same January 17 conversation with Castiglione, Lafayette promulgated an overly broad no-discussion rule in violation of Section 8(a)(1). As correctly noted by the General Counsel, it is unlawful for an employer to restrict conversations about union matters during work time while permitting conversations about other nonwork matters. *Emergency One, Inc.*, 306 NLRB 800 (1992). The General Counsel contends that Lafayette's statements "effectively communicated displeasure with Castiglione's discussion about the Union" and "essentially told Castiglione that he is not to discuss the Union." (GC Br. at 44.) This stretches the reasonable implications of Lafayette's statements well beyond the breaking point. Even under Castiglione's account of the exchange, Lafayette never told him to stop, or even limit, his union-related discussions. To the contrary, Castiglione testified that Lafayette informed him that she was *not* telling him to stop discussing the Union. Indeed, by Castiglione's account, the Respondent *encouraged* employees to discuss their workplace concerns with him. Although Lafayette alluded to the conversations that Castiglione was having with employees since becoming plant chairperson, the record leads me to conclude that Lafayette did this in an effort to address Castiglione's workplace stress, and that Lafayette did not suggest, and cannot reasonably be interpreted as having suggested, that conversations about union matters were impermissible.

For the reasons discussed above, the allegation that the Respondent promulgated an overly broad no-discussion rule in violation of Section 8(a)(1) is without merit and should be dismissed.[30]

B. Alleged Violation of Section 8(a)(1) and (3) Relating to the Elimination of Yard Operator Positions and the Displacement of Three Yard Employees

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (3) by eliminating positions in the scrap yard, and displacing Hoffman, Daniels, and Lambrix from their

that the allegation that he implied unionization would be "futile" is unfounded. I disagree. The credible evidence does show that Lewis acknowledged that the Respondent would have an *obligation* to negotiate regarding various issues if the employees at the facility unionized. However, his other statements—for example, that he would not permit those negotiations to result in significant improvements for employees or even in their retention of what the Respondent already chose to give them—conveyed to employees that the Respondent would not meet its obligation to bargain in good faith.

[30] The complaint also alleges that the Respondent violated Sec. 8(a)(1) when Toni Hallam coercively interrogated employees. This allegation is based on a conversation that Hallam supposedly had with Hoffman shortly after Hoffman attended a meeting conducted by Lewis. For the reasons discussed above, I found that the record did not establish that Hallam made the statements or asked the questions that are alleged to constitute an unlawful interrogation. The allegation of unlawful interrogation should be dismissed.

positions because employees selected the Union as their collective-bargaining representative and engaged in protected activities, and with the purpose of discouraging employees from engaging in protected activities. In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the Board set forth the standards for determining whether an employer has discriminated against an employee on the basis of union or protected activity. Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent's actions were motivated, at least in part, by antiunion considerations. The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Senior Citizens*, 330 NLRB at 1105.

I conclude that the General Counsel has failed to meet its initial burden. The record does not show that Hoffman, Daniels or Lambrix participated in any union or protected concerted activity, and neither the brief of the General Counsel nor the brief of the Union specify any such activity by these employees. The General argues that Hallam's interrogation of Hoffman demonstrates that the Respondent "had, at least, a mistaken belief that [Hoffman] was engaged in Union activity." (GC Br. at 45.) But as discussed above, the evidence did not establish that such an interrogation took place. There was no persuasive evidence that the Respondent had a belief, mistaken or otherwise, that Hoffman was engaged in union or protected concerted activity.[31] With respect to Daniels and Lambrix, there is a complete lack of evidence of protected activity or of the Respondent's knowledge or suspicion of such activity. Neither Daniels or Lambrix were called to testify and the record reveals little other than that they, along with Hoffman, were the scrap yard employees with the least sequential seniority, and were informed of their displacement from the scrap yard during a meeting with Hallam and Nocella.

The Union argues that the Respondent eliminated the yard positions in retaliation for the successful union drive. (UAW's Br. at 16.) The Board has held that unlawful motivation may be shown when an adverse action aimed at punishing employees for union activity affects employees who either did not individually support, or were not known to support, the union activity. *Mini-Togs, Inc.*, 304 NLRB 644, 648 (1991), enforcement granted in part, denied in part 980 F.2d 1027 (5th Cir. 1993); *ACTIV Industries*, 277 NLRB 356 fn.3 (1985). An inference of such motivation is not, however, raised under the facts present here. It was not shown that the scrap yard was a stronghold of union support or that even a single one of the displaced scrap yard employees supported the Union. Thus this is not a case where it appears that some individual employees whose sentiments about a union were unknown to the employer were swept up in the employer's effort to purge or punish union supporters. It is, moreover, implausible that the Respondent would retaliate for the successful union drive among its over 300 employees by displacing three employees none of whom were shown to be union supporters. Second, the evidence definitively showed that well before the union campaign and election, the Respondent had embarked on some of the changes that eventually made the elimination of three positions in the yard possible. When an employee voluntarily left the scrap yard several months prior to the initiation of the union drive, the Respondent decided not to replace that worker, thus indicating that the need for three scrap yard employees per shift was diminishing.[32] Although the timing of the reduction, only a month after the union vote, is a cause for some initial suspicion, see *Equitable Resources Energy Co.*, 307 NLRB 730, 731 (1992), enfd. 989 F.2d 492 (4th Cir. 1993), that suspicion is alleviated upon examination of the record evidence, which, as discussed above, shows that changes in the scrap yard were underway before the union drive and election. The evidence is wholly insufficient to show that the Respondent's had an antiunion motive for eliminating the three scrap yard positions and displacing Hoffman, Daniels, and Lambrix.

The evidence of record fails to satisfy the General Counsel's initial burden under *Wright Line*. Therefore, the allegation that the Respondent violated Section 8(a)(1) and (3) by eliminating three positions in the scrap yard, and displacing Hoffman, Daniels, and Lambrix, should be dismissed.

C. Alleged Failures to Bargain in Violation of Section 8(a)(1) and (5)

1. Elimination of yard positions

The General Counsel fares better with its allegation that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain with the Union before eliminating the three yard positions and displacing Hoffman, Daniels, and Lambrix . An employer violates Section 8(a)(1) and (5) if it changes operations in a way that significantly impacts employees without providing the majority representative with prior notice and a

[31] Hoffman testified that at one of the preelection meetings she told Lewis that "retirement was a big issue because we were gonna lose our medical retirement, and . . . I didn't want to work at North Star for 30 years and have to got to Wal-Mart and be a greeter to have insurance." Tr. 368–369. As discussed above, I do not consider Hoffman a particularly reliable witness, but even assuming that I fully credited her account, such a statement would not constitute protected concerted activity since Hoffman was acting solely on her own behalf and not with, or on the authority, of fellow workers, and said nothing indicating that she was attempting to rally employees towards collective action. *Meyers Industries (II)*, 281 NLRB 882, 885–886 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[32] The Respondent's decision to accomplish the reduction by the forced displacement of employees, rather than through attrition as Hallam indicated the Respondent had done in the past, does not raise an inference of discrimination given the poor state of the Respondent's business. Given those business conditions, it is not surprising that the Respondent would wish to displace the employees to the labor pool where they could be assigned to tasks as needed, rather than retain those employees in the scrap yard where the need for their services had been diminished by the new scrap-handling system.

reasonable opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 745–746 (1962). "[B]argaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy." *First National Maintenance Corp.*, 452 U.S. 666, 681–682 (1981). In the instant case, the Respondent eliminated positions in the scrap yard that were held by members of the bargaining unit and displaced three scrap yard employees to the labor pool. This action resulted in a significant impact on employees and was a mandatory subject of bargaining. *Bundy Corp.*, 292 NLRB 671 (1989). The Respondent did not notify the Union, or give it a reasonable opportunity to bargain prior to making these changes. I conclude that the General Counsel has shown that the Respondent violated Section 8(a)(1) and (5) by failing to give the Union notice and a reasonable opportunity to bargain over the elimination of three scrap yard positions and the displacement of scrap yard employees Hoffman, Daniels, and Lambrix.

The Respondent contends that it was not obligated to bargain over the elimination of the yard positions and the displacement of employees because these were not a change in the status quo. (R. Br. at 39.) According to the Respondent, it put employees on notice of its intent to change the scrap handling system in May 1999, decided how to implement the change in February 2000, and completed the change in August 2000—all prior to the Union's selection as the collective-bargaining representative of employees at the Monroe facility. This argument is without merit. At the time of the union election there were 11 positions in the scrap yard and Hoffman, Daniels, and Lambrix occupied three of those positions. It was not until October 2000 that the Respondent changed the status quo by eliminating three scrap yard positions and displacing Hoffman, Daniels, and Lambrix to the labor pool. The May 1999 memorandum that the Respondent characterizes as providing prior "notice" of the workforce reduction at the scrap yard in reality stated only that the Respondent was examining new scrap yard systems for a number of reasons, including the reduction of manpower in the melt shop. That memorandum explicitly stated that the Respondent's examination of new systems was only in the "feasibility" stage. The memorandum did not state that any change at all in scrap yard operations would necessarily take place as a result of that feasibility study, much less that any change would ultimately meet all of its goals, including a reduction in manpower. To the contrary, the memorandum stated that no decision had been made, and that the Respondent would "publish and communicate the results of this review as they develop, well before any decisions would be made which affected the total number of individuals in the Melt Shop." The evidence does not show that, prior to the implementation of the reduction in October 2000, the Respondent communicated with employees to inform them that a final decision had been made to reduce the number of employees at the melt shop generally, or at the scrap yard in particular.[33] Certainly no communication was made informing the Union or employees that a reduction at the scrap yard would be accomplished by forced displacement rather than by attrition. Although there had been changes in the scrap yard equipment and operations prior to the union election, the expectation, as stated by supervisor Hallam to Hoffman, was that if any reductions in the scrap yard resulted from those changes, the reductions would likely be accomplished by attrition, as they generally had been in the past, not by the elimination of positions and the forced displacement of employees. Based on the record evidence, I reject the Respondent's defense that the status quo prior to the union election included the elimination of three positions in the yard and the displacement of Hoffman, Daniels, and Lambrix.

In a related vein, the Respondent contends that the "yard reduction decision took place outside the [Act's] six-month statute of limitations," see Section 10(b), 29 U.S.C. Section 160(b), and that the allegations regarding the reduction should therefore be dismissed as untimely. (R. Br. at 38.) This argument, too, is without merit. The three employees were informed of the reduction and of their own displacements in October 2000. The initial charge in this case was filed on December 19, 2000, and the amended charge alleging a violation based on the reduction in the scrap yard was filed on February 9, 2001, and served on the Respondent the same day—well within the 6-month limitations period. The Respondent's argument that the charge was untimely is based on the contention that "the decision to reduce the yard operators was made, at the latest, in February 2000." Id. The Respondent's timeliness argument is faulty both legally and factually. The Board has held that "the Section 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice." *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). Assuming that by February 2000 the Respondent had made a decision to reduce the number of employees in the yard and displace employees, the record still does not show that employees or the Union received notice of that decision before October 2000. In addition, even if one believes that the employees must have surmised that the change in scrap handling equipment meant that the Respondent needed three fewer yard operators, the record does not show that those employees knew that anyone would be involuntarily displaced from their positions. Not only did the Respondent fail to inform them of this prior to October, but it actually conveyed a contrary impression when Hallam suggested that any elimination of positions would be through attrition. I reject the Respondent's defense that the complaint allegations regarding the reduction in the yard and the displacement of employees were untimely under Section 10(b).

[33] The Respondent did inform employees that it was switching from the scrap handling system that used cranes and rail cars to a system that used two front-end loaders. However, that does not constitute notice that positions would be eliminated and that the reduction would be accomplished through forced displacement, not attrition. The Respondent's argument to the contrary improperly seeks to impose an obligation on employees to self-notify themselves of planned reductions by correctly surmising that changes in existing equipment forecast their futures with the Respondent. See *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981) (an employer may not satisfy its notice obligation by giving general information from which the union is to infer that a change has occurred).

2. Denial of wage increase in 2001

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (5) by not bargaining with the Union before failing to provide unit employees with an annual wage increase in 2001, during the initial bargaining with the newly certified union. According to the General Counsel, the status quo at the Monroe facility included annual wage increases.

It is undisputed that the Respondent did not bargain about the denial of a wage increase in 2001. However, the record does not establish that the granting of annual wage increases was part of the status quo prior to the union election. In fact, the record shows that as recently as 1998 the Respondent did not grant employees a wage increase. In the 1980s, during a period of economic difficulty, the Respondent did not give wage increases to employees at the Monroe facility in five of ten years. The state of the Monroe facility's business was poor in 2000 and 2001. Because the evidence does not show that an annual wage increase was part of the status quo, and certainly not part of the status quo during periods when business was poor, I conclude that the General Counsel has failed to show that the Respondent violated Section 8(a)(1) and (5) by failing to grant a wage increase in 2001 without first bargaining with the Union. The complaint allegation regarding the denial of a wage increase in 2001 should be dismissed.

3. Transfer of work from Monroe facility

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (5) by failing to bargain with the Union before transferring the processing of nonshrouded steel from the recently unionized Monroe facility to its St. Paul facility. An employer violates Section 8(a)(1) and (5) of the Act when it transfers work performed by unit employees to others outside the bargaining unit without providing the union with notice or an opportunity to bargain. *Ferragon Corp.*, 318 NLRB 359, 366 (1995), enfd. 88 F.3d 1278 (D.C. Cir. 1996); *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1022–1023 (1994). The evidence in this case showed that on one occasion in December 2000 the Respondent transferred the production of 175 tons of steel from its Monroe facility to its St. Paul facility. This was a transfer of work from members of the unit to individuals outside the bargaining unit, but the Respondent did not notify the Union of the transfer or give it an opportunity to bargain. The Respondent's witnesses offered no explanation for the decision to transfer this work.

The Respondent contends that if unit work was affected at all by the transfer of 175 tons of production to the St. Paul facility, it was only marginally affected and that bargaining over the transfer was therefore unnecessary since it did not have a significant effect on unit employees.

The Respondent cites *North Atlantic Medical Services*, 329 NLRB 85, 102 (1999), in which the Board upheld the administrative law judge's ruling that an employer's hiring of two new delivery drivers outside the unit did not require bargaining since that hiring had, at most, marginally affected unit work. That decision, however, was explicitly based on a finding that the employer had shown the hiring resulted in "no appreciable diminution in jobs, hours, or overtime" of unit employees. Id. Indeed it is unclear to me whether work was actually transferred at all in that case. By contrast, in the instant case, the Respondent admits that production *was* transferred from the Monroe to the St. Paul facility. Moreover, that transfer coincided with reductions in unit employees' hours and impending layoffs. Although the work that was transferred constituted a small fraction of the Monroe facility's overall production, and the majority of the reductions were not related to the transfer, that transfer was still substantial and significant enough to play a part in the loss of jobs and hours for some unit employees.

Moreover, the Respondent's transfer of this work was not an isolated incident. The General Counsel also proved that for the November 2000 "rolling"—at a time when employee hours were being curtailed—the Respondent significantly increased the percentage of squares that were sent away from the Monroe facility for stacking by contractors, rather than kept in-house to be stacked by unit employees. Prior to the union election, the highest percentage of squares that the Respondent had ever sent to outside contractors to stack was 40 percent. However, for the November rolling, the first one after the election, the Respondent increased that proportion by half to 60.6 percent. The stacking work had been a significant proportion—approximately 25 percent—of all the work done by inspectors in the Respondent's shipping department. This increase in outsourcing had a significant and substantial affect on the work of unit employees. Even if I believed that neither the transfer of production to St. Paul, nor the increased outsourcing of square stacking, were individually sufficient to have a significant and substantial effect on bargaining unit work, I would have concluded that the work that left the facility as a result of those two changes together dealt an appreciable blow to the jobs and hours of some unit employees.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) and (5) by failing to bargain over its decisions to transfer the processing of 175 tons of steel from its Monroe facility to its St. Paul facility, and to significantly increase the percentage of squares that the Respondent used outside contractors to stack.[34]

4. Layoff and reduction

The General Counsel alleges that the Respondent violated Sections 8(a)(1) and (5) by failing to give the Union a meaningful opportunity to bargain before reducing unit employees' work hours at the Monroe facility, laying off employees, and implementing a layoff procedure that differed from the one provided in the employee manual.[35]

Regarding the reduced work schedules, the record showed that the Respondent met with union officials on October 26, November 1 and 8. According to even Drudi, the parties "negotiated back and forth." (Tr. 38.) On November 8, the parties

[34] For the reasons discussed above, I found that the General Counsel failed to establish that the Respondent increased the use of outside contractors to clean the rake bed in the caster department and perform general labor and housekeeping work. Therefore, the allegations that the Respondent violated Sec. 8(a)(1) and (5) by failing to bargaining with the Union over those alleged actions should be dismissed.

[35] The General Counsel does not allege that the Respondent's decisions to reduce work hours and layoff employees were motivated by antiunion animus in violation of Sec. 8(a)(1) and (3).

reached an agreement concerning the reduced work schedule that was set down in writing and signed by officials of the Union and the Respondent. I conclude that the Respondent met its obligation to bargain with the Union regarding the reduced hours as evidenced by the meetings, the "back and forth" bargaining, and the agreement reached by the parties.

The General Counsel does not explain precisely how it believes the Respondent fell short of its bargaining obligation regarding the reduction in hours, but appears to suggest that the negotiations were inadequate because the agreement between the parties was based on the Respondent's fraudulent representation that it was not outsourcing work. (GC Br. at 55–56.) To the extent that this is the Respondent's contention, it does not withstand scrutiny. I note first that the written agreement makes no mention of an understanding about the outsourcing of work. Moreover, such an understanding was not mentioned in the documents the Union used to communicate and explain the agreement to union members and to the Board. I expect that if an agreement not to outsource work were an aspect of the agreement it would merit at least a passing mention in these documents. Second, at the time the agreement was reached on November 8, the Respondent represented only that it was not outsourcing any more work than it usually did. The record does not show that this was untrue. Although the percentage of the squares from the November rolling that were ultimately stacked by outside contractors was greater than in the past, that stacking apparently was not completed until at least December. The record does not show that the Respondent had even begun stacking squares from the November rolling by the time of the November 8 agreement, and certainly not that it had decided at that time what percentage of the total would ultimately be stacked by outside contractors. The only other increase in outsourcing shown to have occurred was the transfer of 175 tons of steel production to the St. Paul facility and that transfer occurred in December 2000—after the November 8 agreement.

The General Counsel failed to show that the Respondent reduced work hours of unit employees without affording the Union a meaningful opportunity to bargain as required by Section 8(a)(1) and (5) of the Act. Therefore, the complaint allegations based on the Respondent's supposed failure to bargain adequately over the reduction in hours should be dismissed.

I also conclude that the evidence fails to support the allegation that the Respondent did not provide the Union with a reasonable opportunity to bargain about the layoff procedures. The Respondent argues that it implemented the layoff using the preexisting layoff procedures in its handbook and therefore made no change that triggered an obligation to bargain over layoff procedures. (R. Br. at 69–70.) This argument has some merit, see, e.g., *News Journal Co.,* 331 NLRB 1331, 1332 (2000) (not a violation of Section 8(a)(5) where employer applied existing procedure for wage increases), but assuming that the Respondent had an obligation to bargain over the use of the preexisting layoff procedures, I conclude that the Respondent met that obligation. During a meeting on December 6—a full month before the layoff—the Respondent notified the Union of its intent to implement a layoff. The Respondent stated that it was "pressed for time" and therefore had decided to use the existing procedures in the handbook. The Union, through Drudi, insisted that the layoff procedure be based on plant-wide seniority, and refused to discuss any procedure based on the sequential seniority system embodied in the handbook. Kruger then invited union officials to meet with officials of Respondent and stated that, while the Respondent intended to carry out the layoff using the handbook procedures, it was willing to "look at other options" proposed by the Union committee in order to determine how best to implement the layoff.[36] The Union refused that offer to meet, informing the Respondent that it did not want anything to do with a layoff based on the handbook procedures and was unwilling to take any of the "heat" for such a such a layoff, which Drudi said was the Respondent's "baby."

Section 8(a)(1) and (5) requires an employer, after reaching a decision concerning a mandatory subject of bargaining, to delay implementation until after it has consulted with the bargaining representative, but does not require that the employer delay the decision-making process itself. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *Haddon Craftsmen*, 300 NLRB 789, 790 fn.8 (1990), review denied mem.937 F.2d 597 (3d Cir. 1991); *Lange Co*., 222 NLRB 558, 563 (1976). "[W]hen an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent on the union to act with due diligence in requesting bargaining." *Jim Walter Resources*, 289 NLRB 1441, 1442 (1988) (quoting *Clarkwood Corp.*, 233 NLRB 1172 (1977)). Considering all the circumstances of the December 6 meeting, I conclude that the Respondent offered the Union a reasonable opportunity for bargaining regarding the layoff procedures and the Union failed to take advantage of that opportunity. The Respondent's invitation to meet to "look at other options" proposed by the Union indicated that no irrevocable decision to follow the handbook procedures had been made. Thus the Respondent did not simply present the Union with a fait accompli, but "afforded a reasonable opportunity for counter arguments or proposals." *Pinkston-Hollar Construction Services*, 312 NLRB 1004, 1005 (1993). I conclude that the Union waived its right to bargain when, at the December 6 meeting, Drudi refused the Respondent's invitation to meet regarding the layoff procedures. The right to bargain may be waived by clear and unmistakable language as well as by evidence of negotiations. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn. 12 (1983); *Allison Corp.*, 330 NLRB 1363–1365 (2000).[37] Although neither side

[36] There was a good deal of testimony at trial attempting to shed light on the proper interpretation of Kruger's use of the word "tweak" at the December 6 meeting, and in particular on what his use of that word indicated regarding the breadth of issues the Respondent was inviting the Union to bargain about. That testimony was remarkably unenlightening. Kruger's statement, captured in the notes of a member of the Union committee, that the Respondent was willing to "look at other options" proposed by the union committee in order to determine how best to implement the layoff is a much more helpful indicator regarding the nature of the Respondent's offer to negotiate than are the commentaries of witnesses regarding their understanding of what Kruger meant by "tweak."

[37] In a letter sent on December 19, almost two weeks after the December 6 meeting, Drudi requested bargaining "regarding the structure of the layoff and the procedures to be followed." GC Exh. 15. My conclusion that the Union waived bargaining is not changed by the December 19 letter. The Respondent had, on December 6, advised the

exerted exemplary effort to make bargaining regarding the layoff procedures fruitful, the primary and ultimate responsibility for the failure of negotiations rests with the Union, which refused to meet unless the Respondent essentially agreed in advance that the layoff procedure would be based on plantwide seniority. The course of the December 6 meeting leaves the distinct impression that Drudi considered accusing the Respondent of refusing to bargain a better outcome than engaging in negotiations that, even if pursued by all parties in good faith, were still likely to yield a layoff that the newly unionized employees would view as a defeat.

I conclude that the Union's December 6 waiver of bargaining regarding layoff procedures also extended to its right to bargain over the layoff procedures stated in the layoff packet. Furthermore, even after the Union refused the Respondent's offer to meet about the layoff procedures, the Respondent provided the layoff packet to the Union's plant chairperson, Castiglione, for review. Prior to distributing the packet to affected employees, the Respondent modified the packet materials to address the one disagreement Castiglione expressed with its contents.[38]

The General Counsel failed to show that the Respondent implemented layoff procedures without affording the Union a meaningful opportunity to bargain. The complaint allegations based on the Respondent's supposed failure to bargain over the layoff procedures in violation of Section 8(a)(1) and (5) of the Act should be dismissed.

In addition, I conclude that the Respondent did not deny the Union an opportunity to bargain over the decision whether to have the layoff at all. Layoff decisions are a mandatory subject of bargaining and an employer who conducts a layoff without giving the union notice and an opportunity to bargain over a layoff decision and its effects on unit employees violates the Act. *Contech Division, SPX Corp*., 333 NLRB 875 fn. 1 (2001); *Kajima Engineering & Construction*, 331 NLRB 1604 (2000); *Holmes & Narver*, 309 NLRB 146, 147 (1992). In the instant case, Respondent did provide the Union with notice of the layoff and an opportunity to bargain on December 6. However, the evidence does not show that the Union responded by requesting bargaining regarding the decision about whether to have a layoff. Even Drudi's December 19 letter does not request bargaining on that subject, but only about the "structure of the layoff and the procedures to be followed." I conclude that the Union waived bargaining about the decision to have a layoff, and the effects of that decision, by failing to act with due diligence to request bargaining and by refusing the Respondent's invitation to meet regarding how best to carry out the layoff. Therefore, to the extent that the complaint alleges that the Respondent violated Section 8(a)(1) and (5) by failing to give the Union a reasonable opportunity to bargain over the decision to have a layoff, or the effects of that decision, those allegations should be dismissed.

D. Information Requests

An employer must provide information that is requested by a union and is relevant to the union's performance of its statutory duties and responsibilities in representing employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–437 (1967). The standard for assessing relevance is a liberal, discovery-type standard. 385 U.S. at 437; see also *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976). "Where the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required." *Ohio Power Co.*, 216 NLRB at 991. When information does not concern the terms or conditions within the bargaining unit—e.g., when it involves financial information or information on competitors—there is no presumption of relevancy. *Dexter Fastener Technologies, Inc.*, 321 NLRB 612, 612–613 and fn. 2 (1996). In such an instance, the probable or potential relevance of the information must be shown. Id. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). The burden to show relevance is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983).

1. Financial information

The complaint alleges that the Respondent unlawfully refused to provide financial information sought by the Union in the written request dated October 24, 2000.[39] The financial

Union that there was an urgent need for the layoff and Drudi did not send the letter requesting bargaining until almost two weeks later—after he had stated that the Union would not meet with the Respondent and after the Respondent had begun to implement the layoff. Given all the circumstances, I have some doubts as to whether the December 19 letter was a sincere request to bargain and not a delaying tactic. Assuming that that the letter was the former, I conclude that the Union did not exercise due diligence in requesting bargaining. On December 6, the Respondent informed the Union that the need for the layoff was urgent, and still the Union did not send the letter requesting bargaining for nearly two weeks. The Board has found that as little as two days constitute sufficient notice so as not to preclude due diligence on the part of the bargaining representative to demand bargaining. *Jim Walter Resources*, 289 NLRB at 1442.

[38] At trial, Castiglione identified multiple other respects in which he contended that the layoff packet was inconsistent with the procedures in the handbook. It does not appear that the Union raised any of these concerns with the Respondent before the Respondent distributed the packet to affected employees. Thus even assuming that I had not concluded that the Union waived bargaining over the layoff procedures on December 6, I would conclude that it waived bargaining with respect to the changes that the Union alleges were included in the layoff packet.

Moreover, where it is alleged that an unlawful unilateral change has been made that contravenes past practice, it is the General Counsel's burden to demonstrate by a preponderance of the evidence the existence and nature of that practice. *Whirlpool Corp.*, 281 NLRB 17, 22 (1986). In this case, the General Counsel has not established the existence of any existing procedures and practices that were contravened by the provisions in the layoff packet. Even if I agreed that certain layoff packet provisions were at variance with the preexisting layoff procedures I would find that the changes did not have a significant impact on the bargaining unit given the nature of those changes and the lack of credible evidence identifying a single unit employee who had been affected by them. Unilateral changes that do not have a significant impact on the bargaining unit are not material, substantial changes, and do not violate the Act. See, e.g., *Mitchellace, Inc.*, 321 NLRB 191, 193 fn. 6 (1996); *Ironton Publications*, 321 NLRB 1048 fn. 2 (1996).

[39] The complaint originally indicated that the information request was made on September 24, 2000. At the start of trial, I granted the

information requested by the Union is not presumptively relevant to its duties as the representative of employees and therefore the relevance of that information must be demonstrated. See *Dexter Fastener Technologies*, 321 NLRB at 612–613 and fn. 2.[40] Financial information is relevant when a union requires it to assess an employer's assertion that the employer's "'poor financial condition'" justifies concessions by the union. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956) (quoting *Pioneer Pearl Button Co.*, 1 NLRB 837, 842–843 (1936)). The Board has not required that an employer explicitly articulate a claim of inability to pay, or utter any "magic words," in order to trigger an obligation to provide financial information, but has seen it as sufficient that the employer "effectively" makes a claim of inability to pay. S*hell Co.*, 313 NLRB 133 (1993) (employer "effectively pleaded it was presently unable to pay" where it told union that "economic conditions had affected them 'very badly, very seriously,' that present circumstances . . . were . . . a matter of 'survival' and, that 'we are telling you all of this because we need your help'"); see also *Lakeland Bus Lines*, 335 NLRB 322, 324–325 (2001) (employer conveyed a present inability to pay by stating that it was "trying to bring the bottom line back into the black," that acceptance of the offer would enable employer to "retain your jobs and get back in the black in the short term," and that "[t]he future of the [employer] depends on it"). The Board has held that the relevance of financial information is not shown, however, when the employer only claims that concessions are necessary to avoid placing the employer at a competitive disadvantage. *Nielsen Lithographing Co.*, 305 NLRB 697, 699 (1991), affd. sub nom. *Graphic Communications Local 50B v. NLRB*, 977 F.2d 1169 (7th Cir. 1992).

I conclude that in the course of meetings with the Union regarding the reduced work schedule and the layoff, the Respondent made representations regarding its financial condition that triggered an obligation to provide the financial information requested by the Union. *Taylor Hospital*, 317 NLRB 991 (1995) (employer required to furnish budgetary information when it attributed layoffs to reduced revenues and need to meet its budget and remain financially healthy). I have carefully considered the Respondent's contention that, under *Nielsen Lithographing*, supra, it does not have an obligation to supply the requested financial information because it never claimed it was unable to pay, but rather justified the reduction in hours and the layoff based on "market conditions." I disagree, however, with the Respondent's characterization of its representations to the Union. At a meeting with the Union on November 1, 2000, regarding the reduction in hours, Roper made a presentation about the poor state of the Respondent's business and distributed documents indicating that the "extremely low" future orders were "a cause for great concern." The documents explained that "prices [we]re falling," and that several competitors were "effectively bankrupt" and trying to sell-off product to raise cash. New orders were described as "looking bleek [sic]." Dean stated that other facilities operated by the Respondent might also soon be having reductions due to the poor state of the steel industry. At the December 6 meeting regarding planned layoffs, Roper stated that the Respondent might be in the "red" that month. Kruger justified the need for quick action on the layoff by stating that "business was really going south in a hurry." At a January 4, 2001, meeting—shortly before the layoff was implemented—Roper told the Union that the state of the Respondent's business continued to be bleak. These were not merely descriptions of "market conditions," but rather conveyed that the Respondent itself was financially in critical condition. I conclude that the Respondent's statements rise to the level of a claim that actions such as the reduced work schedule and layoff were necessary because of the Respondent's financial inability to pay. Even if I were persuaded that the Respondent had not explicitly claimed an inability to pay, I would conclude that, like the employers in *Lakeland Bus Lines*, supra, *Shell Co.*, supra, the Respondent "effectively" made such a claim, and that the Union, therefore, had a right to obtain financial information in order to meaningfully assess the Respondent's representations.

The Respondent also asserts that during the meetings it gave the Union sufficient financial information. Much of the financial information to which the Respondent alludes was either supplied verbally or displayed to the Union for only a limited time. The Board has held that an employer does not meet its obligation to supply information when it provides the union a limited opportunity to examine materials, but denies the union copies thereby preventing extended consideration. *Good Life Beverage Co.,* 312 NLRB 1060, 1069–1071 (1993); see also *J. I. Case Co. v. NLRB*, 253 F.2d 149, 155 (7th Cir. 1958) (employer violated Act when it orally presented complicated information at a single bargaining session rather than producing copies of records in question). Given the nature of the financial information at issue here, which included statistics and other figures requiring analysis and interpretation, I conclude that the Respondent did not meet its obligation to provide financial information to the Union when it supplied the information verbally or displayed it without providing copies. Moreover, the information supplied at the meetings did not include all the documents and information requested by the Union, but only what the Respondent deemed sufficient. "A respondent's duty to supply information . . . is not satisfied by furnishing only the documents it deems are sufficient. Rather, the Board has long held that, on request, the employer must supply the union with sufficient information to enable it to understand and intelligently discuss the issue raised in bargaining." *Good Life Beverage*, supra. I reject the Respondent's contention that it satisfied its obligation to produce financial information when, at meetings with the Respondent, it provided the Union with a limited opportunity to consider documents and other information that the Respondent deemed sufficient.[41]

General Counsel's unopposed motion to amend the complaint to substitute "October 24, 2000," for "September 24, 2000," in pars. 18 and 22 of the complaint, which relate to the information request.

[40] In *Dexter Fastener*, the same union involved here made an information request that was essentially identical to the one at issue in this case. The Board held that the financial information sought was not presumptively relevant to the Union's duties as the representative of employees. 321 NLRB at 612–613 and fn. 2.

[41] When the Union informed its members of the agreement reached on November 8 regarding the reduced work schedule, it stated that the

The Respondent suggests that some elements of the request were not clear or specific enough to permit it to respond. For example, it indicates that the Union may not have told Kruger what it meant by "income statements." (R Br. at 83.) This is disingenuous. Kruger essentially conceded that he understood what was meant by an "income statement" when he offered to (but did not) provide "last years' income statement" to the Union. Similarly Roper testified that he had seen income statements while working for the Respondent, thus indicating that he, too, understood what one was. I agree that Drudi was not as helpful as he might have been when he answered the Respondent's request that he clarify what had not been provided by merely repeating, verbatim, the text of items from the Union's October 24 request. Moreover, the record suggests that Drudi was prone to badger the Respondent about its response to the information request even when he had not thoroughly examined all the documents the Respondent had already provided.[42] It is quite possible that some of the issues regarding the October 24 information request could have been worked out between the parties if Drudi had responded in a more meaningful way to the request for clarification. However, given that the Respondent had not yet responded in a forthcoming manner to elements of the information request that clearly sought necessary and relevant information, I conclude that the Union has not forfeited its right to additional financial information by failing thus far to clarify its request. The Act does not allow an employer simply to refuse to respond to an ambiguous or overbroad request, but rather requires it to request clarification and/or comply to the extent that the request for information clearly asks for necessary and relevant information. *Keauhou Beach Hotel*, 298 NLRB 702 (1990).

The Respondent refused to provide the Union with requested information regarding management salaries and benefits, claiming that the information was not relevant to bargaining under Board precedent. In its brief, the Respondent does not identify the Board precedent that it believes renders such information beyond the Union's reach. In fact, the Board has held that the where an employer claims an inability to pay, the Union may obtain information about managers' salaries. See *Metlox Mfg. Co.*, 153 NLRB 1388, 1394–1395 (1965), enfd. 378 F.2d 728 (9th Cir. 1967), cert. denied 389 U.S. 1037 (1968). As was noted in *Metlox*, "[s]izeable changes in salaries paid company officials . . . can change the profit-and-loss picture," and "good-faith bargaining, in requiring an employer to substantiate his inability-to-pay plea, requires the employer to show that the figures of profit and loss are not only accurate but that they . . . constitute fair representations of the company's financial condition." Id. I conclude that the management compensation information sought in this case is relevant because of the light it promises to shed on whether the other financial information fairly represents the Company's financial condition.

I conclude that the Respondent violated Section 8(a)(1) and (5) by failing to provide financial information requested by the Union, including, but not limited to, income statements and details on management salaries and benefits.

2. Competitor information

In the October 24, 2000, information request, the Union asked the Respondent to supply: "A list of all your competitors, including company name, address, and whether they are unionized. Also, any wages and benefit information you have on them." Information about competitors is not presumptively relevant to a union's duties as the collective-bargaining representative of employees. *Dexter Fastener*, 321 NLRB at 612–613 and fn. 2. If the employer has no relation to the competitor it is not required to provide information that is not in its possession or control. *CalMat Co.*, 331 NLRB 1084 (2000).

Although information on competitors is not presumptively relevant, I conclude that the Respondent put such information in issue by, inter alia, providing documents to the Union during negotiations, which stated: "prices are falling as our competitors struggle for volume. RTI and CSC are effectively bankrupt along with Qualitech and therefore they need cash." (R. Exh. 18.) As noted above, the Respondent also made other statements that effectively used financial inability to pay as a justification for requiring the reduction in hours and the layoff. By suggesting that the financial desperation of its competitors contributed to the Respondent's own inability to pay and justified concessions by the Union, the Respondent engendered an obligation to provide the Union with sufficient information to enable the Union to understand and intelligently discuss the issue. Thus the Respondent did have an obligation to supply the Union with information in its possession regarding competitors. The Respondent did not meet that obligation in this case by providing a photocopy of a commercially published listing of over a hundred steel companies, the overwhelming majority of which were not competitors. Moreover, Dean, who responded to the October 24 request, admitted at trial that he had salary information regarding one of the Respondent's major competitors, yet he withheld that information from the Union.

I conclude that the Respondent violated Section 8(a)(1) and (5) by withholding information regarding competitors from the Union.

Respondent had provided "comprehensive data surrounding the current business conditions." This statement does lend support to the Respondent's claim that it provided the Union with sufficient information to evaluate the claims the Respondent made regarding the reduction in hours. However, the Respondent does not claim that the Union ever advised it that the financial information provided was sufficient or that the Union was no longer seeking the other documents and information listed in the information request for the purpose of further negotiations relating to the reduced work schedule. Moreover, other actions by the Respondent—e.g., the layoff, the elimination of positions in the scrap yard—gave the Union's request for financial information continued relevance to the Union's duties as the representative of employees.

[42] I do not mean to suggest that the Respondent has a "bad-faith" defense to the information request. Bad faith is an affirmative defense to an information request and must be pled and proved by the Respondent. *Island Creek Coal Co.*, 292 NLRB 480, 489 and fn. 14 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990). Here, the Respondent did not plead "bad faith" as an affirmative defense. Moreover, a bad-faith defense fails if at least one reason for the information request can be justified. As discussed above, there were legitimate reasons for the Union's request for financial information.

3. Subcontracting and transfer of work

The Union repeatedly requested information regarding the Respondent's outsourcing of work. In its October 24, 2000 written request, the Union asked the Respondent to supply "A detailed list of all work that is currently being subcontracted by any temporary service, and any work that may be subcontracted in the next 12 month period, including name and address of whom the work is contracted to." On December 6, 2000, the Union verbally requested a history of the Respondent's use of outside contractors to stack squares, and on January 4, 2001, the Union verbally asked for the storage and transportation costs associated with using outside contractors for that work. On March 6 and 16, 2001, the Union requested information about any steel production that the Respondent was transferring from the Monroe facility to the St. Paul facility.

It is not clear whether the type of outsourcing information sought by the Union is presumptively relevant to bargaining or whether potential or probable relevance must be shown. Compare, *Dexter Fastener*, 321 NLRB at 612–613 and fn. 2 with *Island Creek Coal Co.*, 292 NLRB 480, 488, and 490 fn. 18 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990). At any rate, I conclude that here the record establishes that the information was relevant to assess the Respondent's claim that the reduction in hours and the layoffs were necessary due to its precarious financial condition. Obviously evidence that there were increases in outsourcing at the same time that the reduction in hours or the layoffs were proposed, could indicate that the increased use of nonunit employees, rather than decreased business, was responsible for at least some of the reductions in hours and layoffs. Therefore, the information regarding subcontracting and transfers of work is relevant.

Regarding item 13, the request for a list regarding work being subcontracted, I conclude that the Respondent satisfied its responsibility to provide information under Section 8(a)(1) and (5) by supplying the Union with a list that stated the name, address and phone number of each contractor used by the Respondent and described the general sort of work that the contractor was performing for the Respondent. Although the Union apparently thought it was entitled to additional information, the list that the Respondent provided was a reasonable response to the request with which it was presented. Moreover, when the Respondent asked the Union to specify what information it still needed, the Union declined to clarify. I conclude that the complaint allegation regarding item 13 of the October 24, 2000 information request should be dismissed.

The Respondent answered the Union's December 6, 2000, request for a history of the use of outside contractors to stack squares by providing a memorandum on January 4, 2001, which stated the size of each "rolling" since July 1998 and the percentage of squares that were stacked by outside contractors for each of those rollings. In response to the Union's January 4, 2001 request for the storage and transportation costs associated with the use of outside contractors to stack squares, the Respondent told the Union that there were no storage costs and stated the shipping costs on a "cut weight per foot" basis. Neither the Union nor the General Counsel has clarified what additional information they believe the Respondent possessed and should have supplied about the stacking of squares. I conclude that the Company's response to the information requests regarding the use of outside contractors to stack squares did not violate Section 8(a)(1) and (5). The allegations relating to those requests should be dismissed.

In Response to the Union's request for information about any steel production that was being transferred or reassigned from the Monroe facility to the St. Paul facility, the Respondent stated in a letter that it would not provide the information because it was "subject to" the complaint this case and "no prehearing discovery [is] contemplated by the rules of the National Labor Relations Board." In its brief, the Respondent does not raise this argument,[43] but rather argues essentially that there was no steel production being transferred to St. Paul, with the exception of an inconsequential transfer of 175 tons about which the Respondent had no knowledge until shortly before trial. For reasons discussed above, I conclude that the Respondent was aware of the transfer of 175 tons of steel production from the Monroe facility to the St. Paul facility in December 2000, and that the transfer was significant and substantial enough to require bargaining. I conclude that by refusing to provide the Union with information regarding steel production that was being transferred or reassigned from the Monroe facility to the St. Paul facility, the Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act, when it threatened employees with different, unfavorable, treatment, if they selected the Union as their collective-bargaining representative.

4. The Respondent violated Section 8(a)(1) of the Act, when it threatened employees with reduced hours and layoffs if they selected the Union as their collective-bargaining representative.

5. The Respondent violated Section 8(a)(1) of the Act, when it implied to employees that collective bargaining would be futile because such bargaining would not result in the employees obtaining benefits other than what the Respondent chose to

[43] It may be lawful for an employer to refuse a request for information if factors such as the timing of the request indicate that its purpose was to obtain information to assist in the presentation of evidence relating to a complaint rather than to aid in collective bargaining. See, e.g., *Frontier Hotel & Casino*, 318 NLRB 857, 877 (1995), enfd. in part 118 F.3d 795 (D.C. Cir. 1997). The facts in the instant case, however, do not suggest that the request was motivated by a desire to assist in the presentation of evidence a trial. The Union requested the information on March 6 and 16, 2001, *before* the Regional Director even filed the initial complaint on March 30, 2001. Moreover, the information being sought, which related to the possibility that work was leaving the Monroe facility, was one of the types of information that the Union had been consistently seeking for purposes of collective bargaining almost since the inception of its role as the representative of unit employees. The Respondent has not pointed to persuasive evidence showing that the Union did not seek the information for purposes of fulfilling its lawful duties as collective-bargaining representative.

give them and that unionization would necessarily lead the Respondent to choose to give employees less.

6. The Respondent violated Section 8(a)(1) and (5) of the Act by failing to give the Union a reasonable opportunity to bargain before taking the following actions: eliminating three yard operator positions and displacing employees Cheryl Hoffman, Troy Daniels, and Scott Lambrix; transferring or reassigning the production or processing of 175 tons of steel from its Monroe, Michigan, facility to its St. Paul, Minnesota, facility; and significantly increasing the percentage of squares it used outside contractors to stack.

7. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to supply the following information requested by the Union on October 24, 2000, March 6 and 16, 2001: financial information, including, but not limited to, income statements and details regarding management salaries and benefits; a list of all the Respondent's competitors, including company name, address, union status, and any wage and benefit information that the Respondent possesses regarding each competitor; and, information regarding steel production being transferred or reassigned from the Monroe facility to the St. Paul facility.

8. The Respondent did not commit the other unfair labor practices alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Regarding those instances where I have found that the Respondent unlawfully made changes without giving the Union a reasonable opportunity to bargain, I recommend that the Respondent not only be required to bargain, but also that the status quo ante be restored and that employees be made whole for any lost pay or benefits resulting from the unilateral changes. See *Bundy Corp.*, 292 NLRB 671. Because good-faith bargaining over the elimination of the three yard operator positions and the displacement of Cheryl Hoffman, Troy Daniels, and Scott Lambrix, could have brought about a different result, I will recommend that the Respondent be required to offer those individuals reinstatement to their former positions without prejudice to their seniority or to any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits that resulted from the elimination of the yard operator positions and their displacement from the scrap yard. This includes losses, if any, that are shown during the compliance stage to have resulted from the effects that the elimination of the yard operator positions or the displacements from the scrap yard may have had on the way Hoffman, Daniels, and Lambrix were treated during the reduction in hours in late 2000, and the layoff beginning in January 2001. I recognize that even if the Respondent had bargained over the elimination of the yard operator positions and the displacement of the three employees those changes may nevertheless have taken place as they did. That is something that cannot be known with any certainty because of the Respondent's unilateral action bypassing the bargaining process. I nevertheless conclude that reinstatement and make-whole relief are appropriate since the "'consequences of Respondent's disregard of its statutory obligation should be borne by the Respondent, the wrongdoer herein, rather than by the employees.'" *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 955–956 (1988) (quoting *Hamilton Electronics Co.*, 203 NLRB 206 (1973)). Backpay should be computed on a quarterly basis from the date of any reduction in pay, reduction in work hours, or layoff, that is attributable to either the elimination of the three yard operator positions or the displacement of the employees from the scrap yard, to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]